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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KALAN INC. AND
HOSPITAL CORPORATION OF AMERICA,
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Importers of merchandise must pay estimated duties at the time of entry at the rate and in the amount determined by the United States Customs Service, but may not challenge any aspect of such determination until after the final ascertainment of duties ("liquidation"), which occurs months and sometimes years later. In 1984, Congress enacted section 520(d) of the Tariff Act to provide that when an importer's administrative protest or court challenge against the liquidation is approved, interest shall be allowed on the refund of the amount paid as increased or additional duties from the date of payment to the date of refund of the duties.

The Customs Service has interpreted this provision to require the payment of interest only when the refunded overcharged duties first were collected as a result of a liquidation that changes the initial determination. Thus, when a liquidation does not change the initial determination (as is the case for the vast bulk of the hundreds of billions of dollars of imports entered annually), Customs asserts that it need not pay any interest on refunds that subsequently are made pursuant to the importer's successful administrative or judicial challenge to liquidation.

The question presented is whether, under section 520(d), an importer who is successful in its administrative protest or court challenge is entitled to interest on refunded overcharged duties when the overcharge initially occurs at the time of entry and is affirmed months or years later in liquidation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
Introduction	3
Proceedings in the Court of International Trade: *Kalan Inc. v. United States*	4
Proceedings in the Court of International Trade: *Hospital Corporation of America v. United States*	5
Proceedings in the Court of Appeals for the Federal Circuit: *Kalan Inc. v. United States*	8
Proceedings in the Court of Appeals for the Federal Circuit: *Hospital Corporation of America v. United States*	9
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	13a
APPENDIX D	21a
APPENDIX E	30a
APPENDIX F	34a

TABLE OF AUTHORITIES

CASES:	Page
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982)	10
Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932)	12
District of Columbia v. Carter, 409 U.S. 418 (1983)	12
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982)	10
Sheridan v. United States, 487 U.S. 392 (1988)	10
STATUTES:	
Tariff Act of 1930, as amended:	
Section 505 [19 U.S.C. 1505]	3,6,11
Section 505(b) [19 U.S.C. 1505(b)]	12
Section 505(c) [19 U.S.C. 1505(c)]	2,5,11
Section 520 [19 U.S.C. 1520]	3,11
Section 520(d) [19 U.S.C. 1520(d)]	2,5-7,9-13
28 U.S.C. 1254(1)	2
28 U.S.C. 2632	11
28 U.S.C. 2644	11
MISCELLANEOUS:	
Council of Economic Advisers, *Economic Indicators, October 1991*, 102d Cong., 1st Sess. (Joint Economic Committee Print 1991)	9
Economic Report of the President (Feb. 1991)	10
H.R. Rep. No. 1015, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News	6,7,11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners, Kalan Inc. ("Kalan") and Hospital Corporation of America ("HCA"), respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Federal Circuit entered on September 11, 1991 and September 20, 1991, in two different cases involving identical or closely related issues.[1]

OPINIONS BELOW

The opinion of the court of appeals in Kalan Inc. v. United States (App., *infra*, 1a-10a) is reported at

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[1] Petitioners are not related to each other and neither petitioner has any parent companies or subsidiaries (other than wholly owned subsidiaries).

944 F.2d 847. The opinion of the court of appeals in Hospital Corporation of America v. United States (App., *infra*, 11a-12a) is not reported. The opinions of the Court of International Trade (App., *infra*, 13a-20a, and App., *infra*, 21a-29a) are reported at 752 F. Supp. 455 and 752 F. Supp. 459.

JURISDICTION

The judgments of the court of appeals were entered on September 11 and 20, 1991, and this petition was filed within ninety days of that earlier date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 520(d) of the Tariff Act of 1930, as amended (as codified in 19 U.S.C. 1520(d)), provides:

> If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title, or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) refund, or (2) the filing of a summons under section 2632 of title 28, whichever occurs first.

Section 505(c) of the Tariff Act of 1930, as amended (as codified in 19 U.S.C. 1505(c)), provides:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

Sections 505 and 520 of the Tariff Act of 1930, as amended (as codified in 19 U.S.C. 1505 and 1520, respectively), in their entirety, are set forth in the appendix (App., *infra*, 30a-33a).

STATEMENT OF THE CASE

Introduction

Importers of merchandise must pay estimated duties at the time of entry at the rate and in the amount deemed appropriate by the United States Customs Service. Months or even years later, each entry of imported merchandise is subjected to a final ascertainment of duties, called "liquidation". The overwhelming majority of import entries—probably as high as 97 percent—is liquidated "as entered", that is, without change. In instances when liquidation results in a reduction in duty, Customs issues a refund check; when liquidation results in a duty increase, Customs issues a bill for the increase. Importers are prohibited by law from challenging any aspect of the collection of duties until after liquidation. Thus, whether the liquidation reflects no change in duty, a duty decrease, or a duty increase, the importer may seek

reliquidation—and a reduction in liquidated duties—by filing a protest after liquidation.

This case concerns the way in which the United States Customs Service, following the allowance of importers' protests, settles accounts with importers who have been overcharged by it. If the overcharge is first collected at the time of liquidation, then the Customs Service takes the view that it must pay interest from the date of payment of the overcharged duties. If, on the other hand, the overcharge occurred at the outset—i.e., the estimated duties initially demanded and paid at the time of importation proved to be excessive—Customs takes the position that no interest at all should be paid.

This counterintuitive view of the law was rejected by judges of the Court of International Trade in two separate actions but in each instance the court's judgment was reversed by the court of appeals.

Proceedings in the Court of International Trade: Kalan Inc. v. United States

Petitioner Kalan imported certain key tags from Korea and was required to enter them as jewelry and pay 11 percent estimated duty. The entries were liquidated without change and Kalan protested, claiming that the merchandise was classifiable as articles not specially provided for, of rubber or plastics, and was duty-free under the Generalized System of Preferences. The protest was denied and Kalan initiated an action in the Court of International Trade. Thereafter, in view of a court decision favorable to Kalan in a related case brought by it, Customs reliquidated the entries in accordance with Kalan's claim. Although Customs refunded all overcharged duties, it did not

pay any interest on the refunded duties. Kalan argued before the court that it was entitled to interest from the date of payment of the overcharged duties—i.e., from the date of payment of the estimated duties. App., *infra*, 14a.

Chief Judge Re declined to find that Customs owed interest on its refunds from the date of payment of the estimated duties, but concluded that Customs owed interest from the date of liquidation, since (citing 19 U.S.C. 1520(d) and 1505(c)) that is when the estimated duties became duties due upon liquidation. App., *infra*, 20a.

Proceedings in the Court of International Trade: Hospital Corporation of America v. United States

Petitioner HCA was required to enter its imported lithotripter under the provision for electro-surgical apparatus and to pay estimated duty at 9.2 percent.[2] The entry was liquidated under the same provision and HCA filed a protest, claiming that the merchandise was properly classifiable as electro-medical therapeutic apparatus, which carried a 4.2 percent rate of duty.[3] The protest was denied and HCA initiated an action in the Court of International Trade. While the action was pending, Customs reversed its position on the classification of the merchandise, allowed the

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[2] A lithotripter is a device that creates shock waves, which are used to disintegrate kidney stones within a patient's body without surgical intervention.

[3] Actually, the merchandise was liquidated with a refund because the estimated duty was improperly based on the 1986 rate of 9.2 percent *ad valorem* rather than on the lower 1987 rate of 7.9 percent *ad valorem*. No interest was paid on this refund and this has never been in issue. App., *infra*, 23a n.2.

protest that was before the court, and refunded the overcharged duties but without any interest. HCA sought a judgment which would allow interest from the date the entry was liquidated. App., *infra*, 22a-24a.

The court agreed with HCA's claim, noting the following:

1. In 1984, Congress amended section 505 of the Tariff Act (19 U.S.C. 1505), by adding subsection (c), which provides that if payment of liquidated duties owed by the importer is not received within thirty days after the date of liquidation, interest is due from the fifteenth day after the date of liquidation. App., *infra*, 25a.

2. In fashioning this legislation, Congress acknowledged that if the government is permitted to collect such interest, importers too ought to be allowed to collect interest on overpayments if they are successful in protesting the classification of their merchandise. App., *infra*, 25a (citing H.R. Rep. No. 1015, 98th Cong., 2d Sess. 68, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4960, 5027).[4]

3. "This 'reciprocity of payment of interest' was accomplished 'by adding a new paragraph [section 520(d) of the Tariff Act (19 U.S.C. 1520(d))] which would provide for interest to be paid by the government if a determination is made to reliquidate an entry as a result of a protest. . . . Interest would be paid on the amount of the overcharge at a rate to be determined by the Secretary of the Treasury'."

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[4] The relevant section of H.R. 1015 (pages 66-69) is reproduced in the Appendix. App., *infra*, 34a-37a.

App., *infra*, 25a (citing and quoting from H.R. Rep. No. 1015, 98th Cong., 2d Sess. 67, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4960, 5026).

4. The Customs Service's contention that the refund received by the importer was merely a refund of "estimated duties" and not a refund of "increased or additional duties" upon which interest must be paid under section 520(d) reflected too narrow a construction of section 520(d) to be consistent with the legislative intent. "Estimated duties do not exist in a vacuum. They are the amount which Customs believes will be the duties the importer will owe upon liquidation. Once merchandise is liquidated and Customs determines the duty owed 'upon liquidation' the estimated duties cease to be estimates. Whatever portion of those duties is retained by Customs constitutes the duty paid upon liquidation. Though [HCA] did not itself send payment to Customs at liquidation, the estimated duties on deposit with Customs were used to pay what [HCA] was found to owe upon liquidation. Hence, when Customs retained more of HCA's deposit of estimated duties than it should have, HCA paid excess duties upon liquidation." App., *infra*, 27a (footnote omitted).

5. "Since the government had use of that money to which it had no rightful claim, 19 U.S.C. 1520(d) allows the importer to collect interest on the refund. [HCA] should not be denied interest because it deposited estimated duties prior to liquidation, rather than wait until after liquidation to pay." App., *infra*, 27a.

Proceedings in the Court of Appeals for the Federal Circuit: Kalan Inc. v. United States

Relying on the rule that waivers of sovereign immunity are construed strictly in favor of the sovereign, the court of appeals found no obligation on the part of the Customs Service to pay interest on liquidated overcharges initially collected as an estimated duty deposit at the time of entry rather than on those overcharges collected after liquidation. The court found that "increased or additional duties" were distinct from, and did not embrace, estimated duties paid prior to liquidation (even though after the filing of a protest against the liquidation, the duties were determined to be overcharges). The court based much of its reasoning on the appearance of the words "increased or additional duties" in other statutory provisions and in the relevant legislative history and on the use of those words to signify additional duties due to Customs as a result of liquidation or reliquidation. App., *infra*, 4a-10a.

Proceedings in the Court of Appeals for the Federal Circuit: Hospital Corporation of America v. United States

The court of appeals adopted the reasoning of its *Kalan* decision. It found the "increased or additional duties" language of section 520(d) to be a term of art and to restrict the accumulation of interest only to those overcharged duties first charged at liquidation. The court took "note of the argument that the usage of the word 'overcharge' in the legislative history supports a different interpretation" but concluded that "in view of the meaning in Customs law of the terms 'excess', 'increased', and 'additional' duties, that [restrictive] meaning must apply." App., *infra*, 11a-12a.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted because if the decisions below are left undisturbed, a mischievous rule of law never intended by Congress will work both absurd and unfair results on a large scale, undermining public confidence in an adjudicatory process carried out under the auspices of the Executive and Judicial Branches and unjustly depriving importers of millions of dollars of interest on overcharged duties per year. This case affects the entire importing community of the United States in its day-to-day dealings with the Customs Service.[5]

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[5] That community and the magnitude of commercial activity in which it engages are substantial: in 1990, imports into the United States reached a level of $704.0 billion, or 12.88 percent of the gross national product. *See* Council of Economic Advisers, *Economic Indicators, October 1991*, 102d Cong., 1st Sess. 1 (Joint Economic Committee Print 1991). Twenty-five years earlier, im-

1. The results which flow from the decisions of the court of appeals are irrefutably illogical and absurd. If, upon allowance of a protest, the Customs Service refunds money to an importer, which money was demanded and paid as additional duties following liquidation, Customs will award interest from the date of payment. If, upon allowance of a protest, Customs refunds money to an importer, which money had been demanded and paid earlier as estimated duties, then Customs will award no interest at all, notwithstanding that in the latter situation, Customs will have held the importer's overcharged money for a longer period of time.

In interpreting the relevant statute to produce such a result, the court of appeals was in conflict with an established line of cases of this Court counseling against such an interpretation. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Sheridan v. United States*, 487 U.S. 392, 402-03 n.7 (1988) ("[C]ourts should strive to avoid attributing designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading.").

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ports were at only $33.2 billion (1965 dollars) and accounted for only 4.71 percent of GNP. *See Economic Report of the President* (Feb. 1991) at 286-87.

2. Indeed, Congress manifestly did not intend such a result. The very legislative history discussed by the courts below demonstrates as much. *See* H.R. Rep. No. 1015, *supra*, at 66-68 (App., *infra*, 34a-37a). Congress wished to overturn a decision of the Court of Customs and Patent Appeals which enabled importers to postpone payment of duties determined to be due on liquidation or reliquidation, for an extended period of time, without having to pay interest. While Congress added subsection (c) to section 505 of the Tariff Act in order to provide for interest on duties due the Customs Service following liquidation or reliquidation, it also added subsection (d) to section 520 in recognition of "the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position in an appropriate forum." *Id.* at 68 (App., *infra*, 37a). Thus, under section 520(d), such an importer would receive interest "on the amount of the overcharge . . . calculated from the date of payment to the date of refund or the filing of a summons under 2632 of title 28, United States Code, whichever occurs first." *Id.* at 67 (App., *infra*, 34a).[6] In determining that, at liquidation, overcharged duties paid by an importer previously become an "amount paid as increased or additional duties under section 505(c) ["duties determined to be due upon

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[6] The reason for stating the termination date for calculating interest in the alternative is that an importer's successful action brought by filing a summons in the Court of International Trade under 28 U.S.C. 2632 will result in an award for interest which will be "calculated from the date of the filing of the summons in such action to the date of the refund." *See* 28 U.S.C. 2644. Thus, in such a case, section 520(c) ensures the calculation of interest from the payment of the overcharged duties until the date of filing the summons.

liquidation or reliquidation"] and thereby subject to interest, the Court of International Trade carried out the legislative intent. In finding that the payment of the overcharged duties prior to liquidation prevented the application of the interest directive of section 520(d), the court of appeals thwarted it.

3. The court of appeals was wrongly troubled by the use of the language "increased or additional duties" in other statutes to mean additional duties determined to be due in liquidation or reliquidation and incorrectly determined that that language constituted a term of art, having the same meaning wherever it appeared. In taking the approach that it did, the court failed to appreciate that "[i]t is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("restraint of trade or commerce" appearing in section 3 of the Sherman Act found to have different meaning than identical term appearing in section 1). *See also District of Columbia v. Carter*, 409 U.S. 418 (1973) (District of Columbia held not to be a "State or Territory" for purposes of 42 U.S.C. 1983, although it is a "State or Territory" for purposes of 42 U.S.C. 1982).

The fact that certain duties determined to be owed on liquidation or reliquidation are described as "increased or additional duties" in some provisions of the Tariff Act where it makes sense to so describe such duties (*e.g.*, section 505(b)) does not require the "increased or additional duties" of section 520(d) to

be given the identical meaning when not required by the context and when to do so produces a result at odds with logic and with legislative history.

4. Finally, unless overturned, the decisions of the court of appeals are certain to render section 520(d) a veritable dead letter. It is our understanding that currently fewer than three percent of import entries are liquidated with a duty increase. Under the court of appeals' rulings, it is only those relatively few entries that could possibly present a claim for interest under section 520(d). Moreover, the rulings create a substantial incentive for the Customs Service to establish a practice—if it has not already done so—of erring on the high side when demanding payment of estimated duties. Of course, under such a practice, with all overcharged duties collected prior to liquidation, section 520(d) will cease to be operational.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Federal Circuit.

Nos. 91-1117, 91-1163.

KALAN, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant/Cross-Appellant.

Sept. 11, 1991.

Importer sought interest on refunds of estimated duties that had been deposited upon the entry of merchandise. The Court of International Trade, Edward D. Re, Chief Judge, 752 F.Supp. 455, allowed interest from the date of liquidation, rather than the date of entry. Appeal and cross appeal were taken. The Court of Appeals, Mayer, Circuit Judge, held that the importer was not entitled to interest on refunds of excess estimated duties deposited at entry under the statute that permits an importer to recover interest only on amounts paid as increased or additional duties at liquidation.

Judgment reversed.

* * *

Sidney N. Weiss, New York City, argued, for plaintiff-appellant.

James A. Curley, Commercial Litigation Branch, Dept. of Justice, of New York City, argued, for defendant/cross-appellant. With him on the brief were Stuart M. Gerson, Asst. Atty. Gen., David M. Cohen, Director and Joseph I. Liebman, Atty. in Charge, Intern. Trade Field Office. Also on the brief was Karen P. Binder, Office of Asst. Chief Counsel, U.S. Customs Service, of counsel.

Before ARCHER, MAYER and CLEVENGER, Circuit Judges.

OPINION

MAYER, Circuit Judge.

Kalan, Inc. appeals the judgment of the United States Court of International Trade awarding it interest only from the date of liquidation, rather than from the date of payment, on estimated duties paid at entry and subsequently refunded by the United States Customs Service (Customs). *Kalan, Inc. v. United States*, 752 F.Supp. 455 (Ct. Int'l Trade 1990) (*Kalan II*). The United States cross-appeals, contending that refunds of excess estimated duties deposited at entry bear no interest. We agree with the government and reverse.

Background

The facts are simple and undisputed. During late 1987 and early 1988, Kalan imported key tags from the Republic of Korea. Customs classified the tags as "jewelry" under item 740.41, Tariff Schedules of the United States (TSUS), and required Kalan at entry to deposit duties of 11% *ad valorem*. Kalan complied, but protested that the tags should be classified as non-dutiable "plastics" under TSUS item 774.58 instead. Customs subsequently liquidated the entries "as entered"—it neither refunded any of the duties deposited at entry nor assessed any increased or additional duties—and denied Kalan's protest.

Kalan then filed a civil action contesting the denial in the Court of International Trade. *See* 28 U.S.C. §§ 1581(a),

2631 (1988). The court agreed with Kalan: "the subject product is properly classifiable under item 774.58, TSUS." *Kalan, Inc. v. United States*, 12 C.I.T. 1142, 1146, 1988 WL 128610 (1988) (*Kalan I*). Customs accordingly reliquidated the entries and refunded the liquidated duties in their entirety. It did not, however, pay any interest.

The protest cycle consequently repeated: Kalan protested Customs' refusal to pay interest, the agency denied the claim, and Kalan filed another suit in the Court of International Trade. This time, Kalan did not completely prevail. The government consented to an order awarding Kalan interest on the refunded duties from August 26, 1988, the date Kalan filed its summons in the Court of International Trade, to the date of the refund. *Kalan II*, 752 F.Supp. at 456; *see* 28 U.S.C. § 2644 (1988).* But the court interpreted 19 U.S.C. § 1520(d) to allow Kalan additional interest only from the date Customs liquidated its entries, not the date Kalan paid the estimated duties. Section 1520(d) provides:

> If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, *interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title* at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. *The interest shall be calculated from the date*

* 28 U.S.C. § 2644 provides:

> If, in a civil action in the Court of International Trade under section 515 of the Tariff Act of 1930, the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1986. Such interest shall be calculated from the date of the filing of the summons in such action to the date of the refund.

> *of payment* to the date of (1) the refund, or (2) the filing of a summons under section 2632 of Title 28, whichever occurs first. [Emphasis added.]
>
> Section 1505(c), in turn, specifies:
>
> *Duties determined to be due upon liquidation or reliquidation* shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury. [Emphasis added.]

The court reasoned that the estimated duties Kalan paid at entry "are no longer estimated" once the merchandise is liquidated. *Kalan II*, 752 F.Supp. at 457. "Rather, they then became 'duties determined to be due upon liquidation,' within the meaning of section 1505(c)." *Id.* Therefore, the question was not whether Kalan was entitled to interest *vel non*; it was whether interest should run from the date of payment or from the date of liquidation. *Id.* Notwithstanding section 1520(d)'s clear language that interest "shall be calculated from the date of payment," the court interpreted section 1505(c)'s reference to "liquidation or reliquidation," as well as testimony from congressional hearings on the bill containing the two sections, as mandating the payment of interest from the date of liquidation instead. *Id.* at 457.

Discussion

"In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Congress v. Shaw*, 478 U.S. 310, 314, 106 S.Ct. 2957, 2961, 92 L.Ed.2d 250 (1986). This

so-called "no-interest" rule "provides an added gloss of strictness" on the usual rule that waivers of sovereign immunity are construed strictly in favor of the sovereign. *Id.* at 318, 106 S.Ct. at 2963.

> [T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

Id. (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659, 67 S.Ct. 601, 604, 91 L.Ed. 577 (1947)). *Accord Getty Oil Co. v. United States*, 767 F.2d 886, 889 (Fed.Cir.1985). Section 1520(d) does not contain the affirmative and unequivocal language necessary to entitle Kalan to *any* interest on the refunded excess duties it deposited at entry. Indeed, in conjunction with section 1505(c), other relevant statutory provisions, and the legislative history, section 1520(d) reflects Congress' considered and deliberate refusal to award interest on the type of duties refunded here.

A.

Section 1520(d) expressly allows an importer to recover interest only on amounts "paid as *increased or additional* duties *under section 1505(c).*" 19 U.S.C. § 1520(d) (emphasis added). Section 1505(c), in turn, allows the government to assess interest on delinquent payments only of "duties determined to be due upon liquidation or reliquidation." *Id.* § 1505(c). Here, Customs assessed and Kalan paid *no* duties, "increased" or "additional," at liquidation. All of the entries were liquidated "as entered"; Customs determined that the estimated duties paid at entry satisfied Kalan's tariff obligations. The duties did not thereby

"bec[o]me 'duties determined to be due upon liquidation' within the meaning of section 1505(c)." *Kalan II*, 752 F.Supp. at 457. Except in circumstances not present here, estimated duties are due "at the time of making entry." 19 U.S.C. § 1505(a). They may be *refunded* in whole or in part at liquidation but they are not *due* or *collected* then. Section 1505(b) is likewise unambiguous: "The appropriate customs officer shall collect any increased or additional duties due or refund any excess of duties deposited as determined on a liquidation or reliquidation."

Even accepting the trial court's reasoning, neither it nor Kalan explains how estimated duties paid at entry qualify as "increased" or "additional" duties within the meaning of section 1520(d). As explained in *United States v. Heraeus-Amersil, Inc.*, 671 F.2d 1356, 1357 n. 3, 69 CCPA 86 (1982),

> 19 U.S.C. § 1505(a) requires deposit of estimated duties (i.e., those duties estimated by the importer at time of entry) before the merchandise is released, subject to certain exceptions like posting of a bond. Consequently, imported items cannot leave the docks until the importer's payment (or some recognized equivalent) is presented. Thus, collection or refund of "increased or additional duties" mentioned in § 1505(b) is unrelated to monies paid by the importer at entry. Section 1505(a) leaves no doubt as to when *estimated* duties (as opposed to increased and additional duties) are "due."

We think there is equally little doubt that excess estimated duties are refunded without interest. Neither section 1520(d) itself nor related sections 1505(a)-(c) clearly mandate the payment of interest on duties deposited at entry and subsequently refunded. Besides that, the sole statutory provision dealing directly with the refund of excess deposits is silent about the addition of interest. Section 1520(a) states: "The Secretary of the Treasury is

authorized to refund duties or other receipts . . . whenever it is ascertained on liquidation or reliquidation of an entry that more money has been deposited or paid as duties than was required by law to be so deposited or paid." 19 U.S.C. § 1520(a). Neither we nor the Court of International Trade can supply by creative interpretation the necessary clear direction that Congress omitted.

B.

"When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances. We do not believe that this is one of those rare cases where the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters.' " *Demarest v. Manspeaker*, 498 U.S.—, —, 111 S.Ct. 599, 604, 112 L.Ed.2d 608 (1991) (citations omitted). To the contrary, the relevant legislative history makes clear beyond any doubt that Congress considered but rejected allowing interest on refunds of excess estimated duties paid at entry.

Sections 1520(d) and 1505(c) are cognate; both were enacted in a single section of the Trade and Tariff Act of 1984. Pub.L. No. 98-573, § 210, 98 Stat. 2948, 2977 (1984). The House report accompanying the Act's predecessor bill explains the sections' genesis:

> Currently, a deposit of the estimated duties owed must be made at the time of entry of merchandise, other than entry into warehouse, for transportation, or under bond. If it is determined that increased or additional duties are due, the appropriate customs officer must collect them. *If any excess duties are being refunded, no interest is payable thereon.* No time limits are fixed for the payment of additional or increased duties, and no interest on such amounts owed can be assessed.

* * *

> Until February 18, 1982, the United States Customs Service had based its debt collection responsibilities upon the proposition that "[a] bill for duties, taxes, or other charges is due and payable upon receipt thereof by the debtor" [ ]. However, on February 18, 1982, the United States Court of Customs and Patent Appeals upheld a decision of the Court of International Trade in the [*Heraeus*] case. The decision provides that increased or additional duties determined to be due on liquidation or reliquidation are not due and payable by the importer until either the protest period has expired without a protest being filed (90 days after liquidation or reliquidation), or where a protest has been filed and denied, the time to appeal to the Court of International Trade under 28 U.S.C. § 1581(a) has expired (180 days after denial). Thus, in the latter situation, collection efforts cannot be initiated for a minimum of 270 days.
>
> * * *
>
> Without legislation to overturn the *Heraeus* decision and with the current high interest rates prevailing throughout the country, it is anticipated that any normal business entity, legally able to delay payment of large sums of money without interest, would take advantage of that opportunity.

H.R.Rep. No. 98-1015, 98th Cong., 2d Sess. 67-68, *reprinted in* 1984 U.S.Code Cong. & Admin.News 4910, 4960, 5026-27 (House Report).

Thus, Congress added section 1505(c) to change the effect of *Heraeus:* henceforth, *increased or additional* duties determined to be due upon liquidation or reliquidation would be due 15 days after the date of the liquidation or reliquidation rather than the minimum 90 days allowed under prior law. The Report distinguishes estimated duties

deposited at entry from increased or additional duties assessed at liquidation and makes clear that section 1505(c) applies only to the latter.

> The second part of this legislation [section 1520(d)] recognizes the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position in an appropriate forum. It is similar to but, *as regards increased or additional duties*, goes beyond 28 U.S.C. 2644 which allows interest to be paid to a successful plaintiff in the Court of International Trade but only from the date of filing of the summons, regardless of the date of payment.

Id. at 5027 (emphasis added). Again the intent is clear. Section 1520(d) allows an importer to recover interest on subsequently refunded *increased* or *additional* duties. Only in that regard does the section "go[ ] beyond" 28 U.S.C. § 2644, which allows interest on the *entire* refunded amount "but only from the date of filing of the summons" to the date of the refund. Because section 1520(d) allows interest only on increased or additional duties, it requires that the interest rate be "determined as of the 15th day after the date of liquidation or reliquidation"—when section 1505(c) specifies that increased or additional duties, determined on liquidation, *see* 19 U.S.C. § 1505(b), are due.

In short, the House Report confirms that neither section 1520(d) nor section 1505(c) changed prior law: "If any excess duties are being refunded, no interest is payable thereon." House Report at 5026. Curiously, the trial court ignored the House Report. It relied instead on testimony presented at the congressional hearings on H.R. 3159, the predecessor bill to section 210 of the Trade and Tariff Act of 1984. *See Kalan II*, 752 F.Supp. at 458. But that testimony is consistent with the House Report and underscores Congress' awareness, consideration, and ultimate rejection of the view that it should allow interest on refunds of excess estimated duties. *Id.*

Congress thought it a sound policy to award interest on refunds of some duties but not others; whether we agree with that policy or instead with Kalan's view that the policy is unfair is irrelevant. "The immunity of the United States from liability for interest is not to be waived by policy arguments of this nature. Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *Library of Congress v. Shaw*, 478 U.S. at 321, 106 S.Ct. at 2965 (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. at 663, 67 S.Ct. at 606).

Conclusion

Accordingly, the judgment of the Court of International Trade is reversed.

REVERSED.

APPENDIX B

United States Court of Appeals
for the Federal Circuit

No. 91-1172

HOSPITAL CORPORATION OF AMERICA,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

DECIDED: September 20, 1991

Before NEWMAN, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and LOURIE, *Circuit Judge*.

NEWMAN, *Circuit Judge*.

DECISION

The United States appeals the decision of the Court of International Trade [1] awarding Hospital Corporation of America post-liquidation interest on the refund of customs duties deposited at the time of entry pursuant to 19 U.S.C. § 1520(d). The issue has been decided in *Kalan Inc. v. United States*, Nos. 91-1117, 91-1163 (Fed. Cir. Sept. 11, 1991). For the reasons explained in *Kalan*, the decision of the Court of International Trade is *reversed*. In accordance

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[1] *Hospital Corporation of America v. United States*, 752 F. Supp. 459 (Ct. Int'l Trade 1990).

with 19 U.S.C. § 1520(d) Hospital Corporation is not entitled to interest for the period between liquidation and reliquidation, when the excess duties had been deposited at the time of entry and liquidated at the erroneously high rate. As discussed in *Kalan*, "increased or additional duties" as used in 19 U.S.C. § 1520(d) is a term of art, distinct from "excess duties" paid upon entry. We take note of the argument that the usage of the word "overcharge" in the legislative history, H.R. Report No. 98-1015, 98th Cong., 2d Sess. 68, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4960, 5026, supports a different interpretation; but in view of the meaning in Customs law of the terms "excess", "increased", and "additional" duties, that meaning must apply. Thus interest, on the facts of this case, is payable only for the period after the filing of the summons in accordance with 28 U.S.C. § 2644.

APPENDIX C

United States Court of International Trade.

Court No. 88-08-00688.

KALAN, INC.,

Plaintiff,

v.

THE UNITED STATES, ET AL.,

Defendants.

Nov. 21, 1990.

Importer sought interest on refunds of estimated duties deposited upon entry of merchandise. On cross motions for summary judgment, the Court of International Trade, Re, Chief Judge, held that importer was entitled to interest on refund of estimated duties deposited upon entry of merchandise from date of liquidation, rather than from date of entry, when estimated duties were paid.

Motions granted in part and denied in part.

* * * * * *

Sidney N. Weiss, New York City, for plaintiff.

Stuart M. Gerson, Asst. Atty. Gen.; Joseph I. Liebman, Atty. in Charge, Intern. Trade Field Office, Commercial Litigation Branch (James A. Curley), and (Sheryl A. French and Karen P. Binder, New York City, of counsel, U.S. Customs Service), for defendants.

RE, Chief Judge:

In general terms, the question presented in this case pertains to the date from which importers are entitled to interest, under 19 U.S.C. § 1520(d), on refunds of estimated duties deposited upon the entry of the merchandise.

The merchandise in this action consists of key tags imported from the Republic of Korea. Upon liquidation, the merchandise was classified by the Customs Service as jewelry under item 740.41 of the Tariff Schedules of the United States. (TSUS), with duty at the rate of 11 per centum *ad valorem*. Plaintiff protested this classification and contended that the merchandise was properly classifiable as "[a]rticles not specially provided for, of rubber or plastics," under item 774.58, TSUS, free of duty under the Generalized System of Preferences. This protest was denied, and suit was thereafter commenced in this court. In *Kalan, Inc. v. United States*, 12 CIT—, slip op. 88-165, 1988 WL 128610 (Dec. 1, 1988) (*Kalan I*), this court held that the merchandise was properly classifiable as "[a]rticles not specially provided for, of rubber or plastics," under item 774.58, TSUS, and entered judgment in favor of plaintiff.

It is not disputed that, upon the entry of the merchandise, plaintiff paid estimated duties. It is also not disputed that the entries in this case have been reliquidated in accordance with the decision of this court in *Kalan I*, that all overcharged duties have been refunded to the plaintiff, and that plaintiff has not received any interest on the refunded duties.

Plaintiff contends that, pursuant to 19 U.S.C. § 1520(d), it is entitled to interest on the refunded duties from the date of the actual payment of the estimated duties. According to plaintiff, the excess estimated duties deposited upon the entry of the merchandise are "increased or additional duties" within the meaning of section 1520(d), which mandates payment of interest retroactive to the date of payment.

Defendants contend that plaintiff "is not entitled to payment of interest under 19 U.S.C. § 1520(d) because the language of the statute does not provide for such payment on a refund of estimated duty."

Plaintiff also contends that, under 28 U.S.C. § 2644, it is entitled to interest on the excess duties paid from the date of the filing of the summons. In its motion for summary judgment, defendants admit that plaintiff is entitled to interest from the date of the filing of the summons. Defendants also "consent to entry of an order allowing payment of interest to Kalan under § 2644 from August 26, 1988, the filing date of the summons, to the date of refund."

The question presented is whether, under 19 U.S.C. § 1520(d), plaintiff is entitled to interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties.

Under section 1520(d) importers are entitled to interest on refunds from "the date of payment" of all "increased or additional duties under section 1505(c)." Since section 1505(c) applies only to "[d]uties determined to be due upon liquidation or reliquidation," the court concludes that section 1520(d) does not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties. Rather, since the estimated duties paid by plaintiff became duties due upon liquidation, it is the holding of the court that plaintiff is entitled to interest on its refunds from the date of liquidation.

Contending that there are no genuine issues of material fact, both parties move for summary judgment pursuant to Rule 56 of the Rules of this Court.

DISCUSSION

On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). Furthermore, "[t]he court may not resolve or try factual issues on a motion for summary judgment." *Phone-Mate, Inc. v. United States*, 12 CIT—, 690 F.Supp. 1048, 1050 (1988), *aff'd*, 867 F.2d 1404 (Fed.Cir.1989).

Defendants contend that section 1520(d) does not apply to estimated duties, which are paid upon entry of merchandise, and they therefore contend that plaintiff is not entitled to any interest under section 1520(d) on the refunds of its estimated duties. It is clear, however, that although plaintiff has paid estimated duties upon entry, once the merchandise is liquidated, the duties are no longer estimated. Rather, they then became "[d]uties determined to be due upon liquidation," within the meaning of section 1505(c). Hence, the specific question presented in this case is whether, under section 1520(d), plaintiff is entitled to interest on a refund of estimated duties, paid upon the entry of the merchandise, from the date of payment of those duties, or whether plaintiff is entitled to interest from the date of liquidation.

The question presented is to be resolved by an interpretation of the governing statutes. It is axiomatic that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Section 1520(d) provides that:

> *If a determination is made to reliquidate an entry as a result of a protest filed under section 1514* of this title or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by

> an appropriate court, *interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title* at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of title 28, whichever occurs first.

19 U.S.C. § 1520(d) (1988) (emphasis added).

Section 1505(c), which is expressly referred to in section 1520(d), provides that:

> Duties determined to be due *upon liquidation or reliquidation* shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

19 U.S.C. § 1505(c) (1988) (emphasis added). It is important to note that both section 1520(d) and section 1505(c) were enacted as section 210 of the Trade and Tariff Act of 1984, Pub.L. No. 98-573, 98 Stat. 2948, 2977 (1984).

The interpretation of section 1520(d) together with section 1505(c) indicates that Congress did not intend to grant interest on refunds of estimated duties from the date of payment of those duties. Section 1520(d) is expressly limited to "increased or additional duties under section 1505(c)." Section 1505(c), in turn, is expressly limited to "[d]uties determined to be due upon liquidation or reliquidation." It is clear, therefore, that section 1520(d) does not grant interest on refunds of estimated duties paid upon the entry of the merchandise.

Furthermore, it is well established that, as part of the legislative history of a statute, the testimony presented at

congressional hearings may be helpful in ascertaining the intent of Congress. *See, e.g., Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204-12, 100 S.Ct. 2601, 2617-21, 65 L.Ed.2d 696 (1980). In this case, the testimony and comments received by the Subcommittee on Trade of the House Ways and Means Committee on H.R. 3159, the House bill which was eventually enacted into law as section 210 of the Trade and Tariff Act of 1984, provides convincing support for the conclusion of the court. A careful review of the testimony and comments leaves no doubt that, in considering H.R. 3159, the Subcommittee on Trade was aware that the government, bar, and industry understood that the bill did not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties.

For example, Arthur I. Rettinger, an attorney with the Office of the Chief Counsel of the United States Customs Service, testified that "the bill in no way affects overpayments or underpayments of estimated duties as these payments have traditionally been recognized as separate and distinct from liquidations for refunds or liquidations involving additional assessments." *Hearings on H.R. 3159 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. (1983), *reprinted in Miscellaneous Tariff and Trade Bills: Hearings and Written Comments Before the Subcomm. on Trade of the Comm. on Ways and Means of the House of Representatives*, 98th Cong., 1st and 2d Sess., Serial 98-76, at 18 (1985) (hereinafter *Hearings*).

The industry's interpretation of H.R. 3159 may be gleaned from the statement of Eugene J. Milosh, executive vice president of the American Association of Exporters and Importers (AAEI). Mr. Milosh explained that:

> At the time of entry the Customs Service has the authority under section 505(a) of the Tariff Act of 1930, authority which it frequently exercises, to insist

> that the importer pay estimated duties in an amount deemed appropriate by the Service. It is AAEI's belief that the great majority of entries are accompanied by duty deposits in amounts ultimately deemed proper by the Customs Service. *These duty deposits are not the subject of this legislation. H.R. 3159 addresses only increased duties, that is additional duties found due subsequent to entry at the time of liquidation or re-liquidation.*

Hearings at 113. Indeed, in his testimony regarding the bill Mr. Milosh set forth a proposed amendment which would have granted interest on refunds of estimated duties from the date of entry. *See id.* at 114-16. Furthermore, Ms. Marjorie M. Shostak, appearing before the Subcommittee on behalf of the Joint Industry Group, stated that "[t]he provision in . . . H.R. 3159 to pay interest on re-liquidations of entries applies only to amounts deposited as increased duties and does not include the duty deposited when the entry was filed." *Id.* at 129. Like Mr. Milosh, Ms. Shostak recommended that "interest should be paid on any amounts refunded, not merely the increased duty portion thereof." *Id.*

The interpretation of the bar was given by Joseph F. Donohue, Jr., the Chairman of the Administrative Practice Committee of the Customs and International Trade Bar Association. Mr. Donohue stated that H.R. 3159 "provides for the payment of interest on any repayment of increased duties." *Id.* at 117. Mr. Donohue also noted that Customs determines the amount of estimated duties deposited upon the entry of the merchandise. He then advocated that H.R. 3159 be amended to provide for interest on refunds of estimated duties from the date of entry, since "[i]t would be appropriate to include interest on such refund[s] since the importer was deprived [of] the use of the money during the period that it was held by Customs." *Id.* at 120.

A statement was also submitted by the Section of Administrative Law of the American Bar Association. In its

statement, the Section stated that it "[s]upports the provisions of [H.R. 3159] for the payment by the Government of interest on any repayment of increased duties and recommends also that interest be paid on refunds of duty deposited against the original entry." *Id.* at 215.

It is important to note that none of the witnesses who appeared before the Subcommittee interpreted H.R. 3159 to grant interest on refunds of estimated duties from the date of payment of those duties. Furthermore, despite the suggestions of several of the witnesses before the Subcommittee, Congress did not amend H.R. 3159. Hence, the conclusion is inescapable that, after considering the testimony of the witnesses and choosing not to act on the suggested amendments, Congress intended that importers should not receive interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties.

CONCLUSION

Under 19 U.S.C. § 1520(d) importers are entitled to interest from "the date of payment" on refunds of all "increased or additional duties under section 1505(c)." Since 19 U.S.C. § 1505(c) applies only to "[d]uties determined to be due upon liquidation or reliquidation," the court concludes that section 1520(d) does not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties. Rather, since the estimated duties paid by plaintiff became duties due upon liquidation, it is the holding of the court that plaintiff is entitled to interest on its refunds from the date of liquidation.

Accordingly, defendants' motion is denied in part and granted in part, and plaintiff's cross-motion is denied in part and granted in part.

APPENDIX D

United States Court of International Trade.

Court No. 89-08-00462.

HOSPITAL CORPORATION OF AMERICA,

Plaintiff,

v.

UNITED STATES,

Defendant.

Nov. 23, 1990.

Importer of medical device sought to recover interest on duty refund paid by United States Customs Service. On cross-motions for summary judgment, the Court of International Trade, Tsoucalas, J., held that: (1) importer was entitled to interest on excess estimated duties held by Customs upon liquidation, from date of payment of excess duty to date of filing of summons, and (2) importer was also entitled under separate statutory provision to receive interest from date of filing of summons to date Customs paid it.

Plaintiff's motion granted; defendant's cross-motion denied.

* * * * * *

Ober, Kaler, Grimes & Shriver, John F. Morkan, III, Baltimore, Md., for plaintiff.

Stuart M. Gerson, Asst. Atty. Gen.; Joseph I. Liebman, Atty.-in-Charge, Intern. Trade Field Office, Commercial Litigation Branch, Civ. Div., U.S. Dept. of Justice, James A. Curley, of counsel: Karen P. Binder, Office of Asst. Chief Counsel, Intern. Trade Litigation, U.S. Customs Service, New York City, for defendant.

OPINION

TSOUCALAS, Judge:

Plaintiff, Hospital Corporation of America ("HCA"), brings this action pursuant to Rule 56 of the rules of this Court for summary judgment, asserting that there is no dispute as to any material facts and that it is entitled to judgment as a matter of law. Plaintiff seeks to recover interest under 19 U.S.C. § 1520(d) (1988), and 28 U.S.C. § 2644 (1988), on a duty refund paid by the United States Customs Service ("Customs").[1] Defendant argues that the refund was of estimated duties and section 1520(d) does not authorize the payment of interest on refunds of estimated duties, only on refunds of "increased or additional duties."

Background

Plaintiff imported the Dornier extracorporeal shock wave lithotripter ("lithotripter") involved in this action in 1986. The lithotripter is a medical device which uses electrical charges to create shock waves that disintegrate kidney

[1] The government has consented to the payment of interest under 28 U.S.C. § 2644, on the refund already paid by Customs to HCA on September 8, 1989. *Defendant's Brief in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* at 5-6 ("Defendant's Brief"). That interest is payable from the date the summons was filed, August 3, 1989, to the date the refund was paid, September 8, 1989. 28 U.S.C. § 2644 (1988). However, that does not address payment of interest on the monetary judgment at issue in this case, *i.e.*, the award of interest on the refund.

stones within a patient's body without surgical intervention. Prior to entry of the merchandise, Customs classified lithotripters as "electro-surgical apparatus" under item 709.15, Tariff Schedules of the United States ("TSUS"). C.S.D. 84-60 (Dec. 30, 1983).

The merchandise then was entered under item 709.15 and stored in a bonded warehouse. In order to release the lithotripters, Customs required a deposit of estimated duties in the amount of $219,157.89, which was the amount due pursuant to classification under 709.15.[2] These duties were deposited by HCA "unwillingly," so that the goods would be released. *Brief in Support of Hospital Corporation of America's Motion for Summary Judgment* at 8 ("Plaintiff's Brief"). On April 3, 1987, Customs liquidated the lithotripter under item 709.15, TSUS.

Plaintiff filed a protest on June 26, 1987, challenging the classification of the merchandise under item 709.15, TSUS, and claiming classification under item 709.17, TSUS, as "electro-medical apparatus, . . . other," which carries a lower rate of duty. In January 1988, Customs revoked its classification of lithotripters under item 709.15, TSUS, and held that lithotripters are properly classified under item 709.17, TSUS, the classification requested by plaintiff in its protest. C.S.D. 88-5 (Jan. 21, 1988). In April 1989, plaintiff requested accelerated disposition of the protest, pursuant to 19 U.S.C. § 1515(b) (1988) and 19 C.F.R. § 174.22 (1988). The protest was deemed denied when Customs did not act on the request within thirty days. *See* 19 U.S.C. § 1515(b); 19 C.F.R. § 174.22(d).

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[2] Customs states that it gave HCA a refund of $25,727.23 at the time of liquidation in April 1987, because the estimated duties had been assessed improperly based on the 1986 rate of 9.2% *ad valorem* rather than on the lower 1987 rate of 7.9% *ad valorem*. No interest was paid on this refund and plaintiff does not seek to recover interest on this amount. *See Defendant's Brief* at 2. Following the refund, the total estimated duties on deposit with Customs was $193,430.66.

HCA filed a summons on August 3, 1989, challenging the classification and the rate and amount of duties. On September 7, 1989, plaintiff filed its Complaint, wherein HCA sought to recover a refund plus interest pursuant to 19 U.S.C. § 1520(d). The next day, September 8, Customs granted the protest, noting that lithotripters should be classified under item 709.17, TSUS. The entry was reliquidated and Customs refunded to HCA the difference between what initially was paid to Customs pursuant to item 709.15, TSUS, and what properly was due under item 709.17, TSUS. However, Customs paid no interest on the refund.

None of these facts is in dispute, and both parties have moved for summary judgment pursuant to Rule 56 of the Rules of the Court of International Trade.

Discussion

When deciding a motion for summary judgment pursuant to Rule 56, the Court must determine if there are any genuine issues of material fact. *Phone-Mate, Inc. v. United States*, 12 CIT—, —, 690 F.Supp. 1048, 1050 (1988), *aff'd*, 867 F.2d 1404 (Fed.Cir.1989). If there are, summary judgment is inappropriate. Upon examination of the relevant statutes, caselaw and supporting papers, the Court finds that there are no genuine issues of material fact, and hence, judgment as a matter of law is proper in this matter.

I. 19 U.S.C. § 1520(d)

When Customs liquidates an entry, the importer of the entry must pay the duty owed within fifteen days after the date of liquidation. 19 U.S.C. § 1505(c) (1988). If payment is not received by Customs within thirty days after such date, interest is due from the fifteenth day after the date of liquidation. *Id.; Syva Co. v. United States*, 12 CIT—, —, 681 F.Supp. 885, 88990 (1988); *Penrod Drilling Co. v. United States*, 13 CIT—, —, 727 F.Supp. 1463,

1465 (1989). The provision which authorizes the government to collect interest on late payments was added to § 1505 by the Trade and Tariff Act of 1984, and was designed to prevent importers from delaying payment of duties owed to the United States. The rationale for this change was that the United States was denied the rightful use of this money while the importer profited from it.

In fashioning this legislation, Congress acknowledged that if the government is permitted to collect such interest, importers too ought to be allowed to collect interest on overpayments if they are successful in protesting the classification of their merchandise. H.R.Rep. No. 1015, 98th Cong., 2d Sess. 68, *reprinted in* 1984 U.S.Code Cong. & Admin.News 4960, 5027. This "reciprocity of payment of interest" was accomplished "by adding a new paragraph which would provide for interest to be paid by the government if a determination is made to reliquidate an entry as a result of a protest. . . . Interest would be paid on the amount of the overcharge at a rate to be determined by the Secretary of the Treasury." *Id.* at 67, U.S.Code Cong. & Admin.News 5026.

In the present case, HCA was overcharged on the duties it owed for the lithotripter. When Customs liquidated the entry on April 3, 1987, it collected the duty due pursuant to liquidation under item 709.15, TSUS, that is $193,430.66.[3] *See* note 2, *infra.* Plaintiff protested the classification on June 26, 1987. After Customs granted the protest and reliquidated the entry on September 8, 1989, under item 709.17, TSUS, it refunded to plaintiff the difference between what was paid by plaintiff under item 709.15, TSUS, and what properly was owed under item 709.17, TSUS, that is, the overcharge. However, Customs

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[3] Since plaintiff had deposited estimated duties prior to liquidation, the monies due were already in Customs' custody long before the liquidation.

paid no interest on the overcharge and denies that interest is owed to the importer.

Section 1520(d) provides that interest is payable when Customs reliquidates an entry and returns to the importer what was paid as "increased or additional duties under section 1505(c)." Section 1505(c) sets the time limits for payment of "[d]uties determined to be due upon liquidation."[4] If Customs or this Court thereafter determines that excess duties were paid upon liquidation, the importer is entitled to a refund of those excess duties plus interest. 19 U.S.C. § 1520(a) and (d).

Customs contends, however, that "increased or additional duties" do not include excess estimated duties retained by Customs upon liquidation.[5] The government thus construes the increased or additional duties referred to in section 1520(d) to be only those duties which, at the time of liquidation, Customs finds are due in addition to any estimated duties already assessed. This interpretation is founded on Customs' contention that an importer who has deposited estimated duties does not pay any duties at liquidation, unless "increased or additional duties" are imposed. "The only duties paid by [such importers are] estimated duties paid at the time of entry of the merchandise, or shortly after." *Defendant's Brief* at 2, n. 2.

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[4] 19 U.S.C. § 1505(c) provides that:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

[5] Customs bases this argument on the fact that within § 1505, "estimated duties" and "increased or additional duties are discussed in different subsections." *See* 19 U.S.C. § 1505(a) and (b).

The Court finds that Customs has construed § 1520(d) too narrowly to be consistent with its legislative intent, and has improperly excluded excess estimated duties held by Customs upon liquidation from the purview of the section. Estimated duties do not exist in a vacuum. They are the amount which Customs believes will be the duties the importer will owe upon liquidation.[6] Once merchandise is liquidated and Customs determines the duty owed "upon liquidation," the estimated duties cease to be estimates. Whatever portion of those duties is retained by Customs constitutes the duty paid upon liquidation. Though plaintiff did not itself send payment to Customs at liquidation, the estimated duties on deposit with Customs were used to pay what plaintiff was found to owe upon liquidation. Hence, when Customs retained more of HCA's deposit of estimated duties than it should have, HCA paid excess duties upon liquidation.

After the government granted the protest and reliquidated the lithotripter at a lower rate of duty, HCA was entitled to, and received, a refund of the duties it overpaid. 19 U.S.C. § 1520(a). Since the government had use of that money to which it had no rightful claim, 19 U.S.C. § 1520(d) allows the importer to collect interest on the refund. Plaintiff should not be denied interest because it deposited estimated duties prior to liquidation, rather than wait until after liquidation to pay. For the Court to hold otherwise would be to subvert what Congress manifestly intended in enacting reciprocal interest provisions.[7]

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[6] Customs' regulations state that the amount of estimated duties to be deposited shall be "an amount deemed necessary by the district director to sufficiently cover the prospective duties on each item being entered or withdrawn." 19 C.F.R. § 141.103 (1989).

[7] The government contends that this position is not truly reciprocal because Customs would be liable for interest on refunds of estimated duties while the importer would not be liable for interest on estimated duties that are due but are not paid at the time of entry. *Defendant's*

II. 28 U.S.C. § 2644

Plaintiff also seeks to recover interest under 28 U.S.C. § 2644. That section authorizes the payment of interest on monetary relief obtained under a stipulation agreement or by a judgment in a civil action before this Court pursuant to section 515 of the Tariff Act of 1930. 28 U.S.C. § 2644; *United States v. Atkinson*, 6 CIT 257, 261, 575 F.Supp. 791, 795 (1983). Plaintiff has been awarded monetary relief in the form of interest on the refund it received from Customs subsequent to reliquidation of its merchandise. The action having been brought pursuant to section 515 and a monetary judgment having been awarded, plaintiff is entitled to receive interest under § 2644 from the date of the filing of the summons to the date Customs pays plaintiff. 28 U.S.C. § 2644.

Conclusion

Accordingly, the Court holds that plaintiff is entitled to collect interest from Customs on the amount of duty it overpaid. That amount is the difference between what was paid in estimated duties under item 709.15, TSUS, and what rightfully was owed under item 709.17, TSUS, to wit, $88,139.59. Therefore, Customs is directed to pay to HCA interest on $88,139.59 from the date of payment of the excess duty, *i.e.*, the date of liquidation (April 3, 1987), to the date of the filing of the summons (August 3, 1989).[8] Interest shall be at the rate established by law.

Brief at 8. The analogy is inapposite because the Court is not holding that the statute compels Customs to pay interest from the date the estimated duties were paid. Rather, Customs is liable for interest only from the date of payment of the duties due upon liquidation. In this case, since Customs was in possession of an amount intended to cover the "duties due upon liquidation" prior to liquidation, the date of payment was the date of liquidation.

[8] Interest under § 1520(d) "shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons

Customs also is directed to pay interest on the monetary judgment entered herein pursuant to 28 U.S.C. § 2644 from August 3, 1989 until the date payment is made.

JUDGMENT

Plaintiff having moved for summary judgment and defendant having cross-moved for summary judgment, and the Court after due deliberation having rendered a decision herein; now, then, in conformity with said decision, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied, and it is further

ORDERED that defendant pay to plaintiff interest, pursuant to 19 U.S.C. § 1520(d), on the refund paid by defendant on September 8, 1989, to wit, $88,139.59 at the rate of interest established by law, and it is further

ORDERED that such interest is payable from April 3, 1987 to August 3, 1989, and it is further

ORDERED that defendant pay to plaintiff interest, pursuant to 28 U.S.C. § 2644, on the monetary judgment entered above, from August 3, 1989 to the date payment is made by defendant.

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under section 2632 of Title 28, whichever occurs first." 19 U.S.C. § 1520(d). The refund was paid on September 8, 1989, hence the filing of the summons on August 3, 1989 occurred first.

APPENDIX E

UNITED STATES CODE, TITLE 19

§ 1505. Payment of duties

(a) Deposit of estimated duties

Unless merchandise is entered for warehouse or transportation, or under bond, the importer of record shall deposit with the appropriate customs officer at the time of making entry, or at such later time as the Secretary may prescribe by regulation (but not to exceed thirty days after the date of entry), the amount of duties estimated by such customs officer to be payable thereon.

(b) Collection or refund

The appropriate customs officer shall collect any increased or additional duties due or refund any excess of duties deposited as determined on a liquidation or reliquidation.

(c) Duties due upon liquidation or reliquidation; delinquency; interest

Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

(June 17, 1930, ch. 497, title IV, § 505, 46 Stat. 732; June 2, 1970, Pub. L. 91-271, title II, § 204(c), 84 Stat. 283; Oct. 3, 1978, Pub. L. 95-410, title I, § 103, 92 Stat. 889; Jan 12, 1983, Pub. L. 97-446, title II, § 201(e), 96 Stat. 2350; Oct. 30, 1984, Pub. L. 98-573, title II, § 210(a), 98 Stat. 2977.)

§ 1520. Refunds and errors

(a) Cases in which refunds authorized

The Secretary of the Treasury is authorized to refund duties or other receipts in the following cases:

(1) *Excess deposits*

Whenever it is ascertained on liquidation or reliquidation of an entry that more money has been deposited or paid as duties than was required by law to be so deposited or paid;

(2) *Fees, charges, and exactions*

Whenever it is determined in the manner required by law that any fees, charges, or exactions, other than duties and taxes, have been erroneously or excessively collected; and

(3) *Fines, penalties, and forfeitures*

Whenever money has been deposited in the Treasury on account of a fine, penalty, or forfeiture which did not accrue, or which is finally determined to have accrued in an amount less than that so deposited, or which is mitigated to an amount less than that so deposited or in remitted.

(4) *Prior to liquidation*

Prior to the liquidation of an entry, whenever it is ascertained that excess duties, fees, charges, or exactions have been deposited or paid by reason of clerical error.

(b) Authorization of appropriations

The necessary moneys to make such refunds are authorized to be appropriated annually from the general fund of the Treasury.

(c) Reliquidation of entry

Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction; or

(2) any assessment of duty on household or personal effects in respect of which an application for refund has been filed, with such employee as the Secretary of the Treasury shall designate, within one year after the date of entry.

(d) Interest rates; calculation

If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title, or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of Title 28, whichever occurs first.

(June 17, 1930, ch. 497, title IV, § 520, 46 Stat. 739; June 26, 1934, ch. 756, § 2, 48 Stat. 1225; June 25, 1938, ch. 679, § 18, 52 Stat. 1086; Aug. 8, 1953, ch. 397, § 20, 67

Stat. 519; June 2, 1970, Pub. L. 91-271, title II, § 210, 84 Stat. 287; Oct. 3, 1978, Pub. L. 95-410, title II, § 210, 92 Stat. 903; Oct. 30, 1984, Pub. L. 98-573, title II, §§ 210(b), 212(c)(B), formerly 212(b)(7)(B), 98 Stat. 2977, 2984, renumbered Oct. 22, 1986, Pub. L. 99-514, title XVIII, § 1889(3), 100 Stat. 2925.)

APPENDIX F

Excerpt (Pages 66-69) From
H.R. REP. NO. 1015, 98th Cong., 2d Sess. (1984)

Section 203. Date of Liquidation or Reliquidation

(Originally introduced as H.R. 3159 by Mr. Gibbons)

Section 203 would amend section 505 of the Tariff Act of 1930 (19 U.S.C. 1505) by adding a new paragraph which would prescribe the due date of liquidation or reliquidation of duties to be 15 days after the date of liquidation or reliquidation and, if not paid within 30 days after that date, interest would be assessed from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury. Further, this section would be effective thirty days after enactment and any pending duties would be due thirty days following enactment.

This section would also amend section 520 of the Tariff Act of 1930 (19 U.S.C. 1520) by adding a new paragraph which would provide for interest to be paid by the government if a determination is made to reliquidate an entry as a result of a protest filed under section 514 of the Act or if an application for relief is made under subsection (c)(1) of Section 520 of the Tariff Act of 1930 or if reliquidation is ordered by an appropriate court. Interest would be paid on the amount of overcharge at a rate to be determined by the Secretary of the Treasury and determined as of the 15th day after the date of liquidation or reliquidation. Interest would be calculated from the date of payment to the date of refund or the filing of a summons under 2632 of title 28, United States Code, whichever occurs first.

The rate of interest to be assessed under this legislation should be determined in the same manner as the Secretary of the Treasury currently determines the rates of interest applicable to underpayments and overpayments of income

taxes pursuant to 26 U.S.C. 6622 with the rate based on the prime interest rate charged by banks and with provision for adjustment of the rate on March 31 or September 30 of each year.

The Committee understands that Customs will take no disciplinary action against importers solely on the grounds of failure to pay increased or additional duties on liquidation or reliquidation until a decision is reached on a protest filed under section 514.

Currently, a deposit of the estimated duties owed must be made at the time of entry of merchandise, other than entry into warehouse, for transportation, or under bond. If it is determined that additional or increased duties are due, the appropriate customs officer must collect them. If any excess duties are being refunded, no interest is payable thereon. No time limits are fixed for the payment of additional or increased duties, and no interest on such amounts owed can be assessed. The increased duties need not be paid on liquidation and need not be deposited in order to protest their assessment before the Customs Service; they must be paid prior to filing a civil action in the Court of International Trade, or the expiration of the time for filing such an action (180 days).

The procedures for collecting duties beyond the deposited amount and for refunding excess duties paid are as follows:

A notice of any additional or increased duties being assessed must be sent to the importer of record or to the actual owner of the imported merchandise. Regulations of the U.S. Customs Service provide procedures for the refunds of excess duties collected. 19 CFR 24.36. Separate application to the assistant regional commissioner of the pertinent internal revenue region must be made for refunds of excess internal revenue taxes paid.

Finally, regulations require that notice of liquidation of formal entries be given by bulletin notice and provide for

notice of liquidation of other entries including entries liquidated by operation of law. 19 CFR 159.9-159.10. While courtesy notices of the liquidation of certain entries may be sent to importers or their agents, the actual bulletin notices are posted in the various customhouses, each notice covering entries filed at that customs port of entry or station. Thus, an importer or other person must check the bulletin notices regularly to ascertain whether entries have been liquidated and the dates of such liquidation if a refund is due, but a bill for any additional or increased duties owed will be sent.

This legislation is strongly supported by U.S. Customs and the U.S. Treasury.

Until February 18, 1982, the United States Customs Service had based its debt collection responsibilities upon the proposition that "[a] bill for duties, taxes, or other charges is due and payable upon receipt thereof by the debtor" (19 CFR 24.3(e)). However, on February 18, 1982, the United States Court of Customs and Patent Appeals upheld a decision of the Court of International Trade in the case of *United States v. Heraeus-Amersil, Inc.*, 671 F.2d 1356. The decision provides that increased or additional duties determined to be due on liquidation or reliquidation are not due and payable by the importer until either the protest period has expired without a protest being filed (90 days after liquidation or reliquidation), or where a protest has been filed and denied, the time to appeal to the Court of International Trade under 28 U.S.C. 1581(a) has expired (180 days after denial). Thus, in the latter situation, collection efforts cannot be initiated for a minimum of 270 days.

The effect of the proposed legislation would be to allow Customs to take immediate steps to collect monies determined to be due and payable to the United States. If the duties were not paid within the time allotted by this bill, then the importers would be assessed interest in accord-

ance with section 306 of Public Law 96-304 and regulations to be promulgated by the Customs Service.

Without legislation to overturn the *Heraeus* decision and with the current high interest rates prevailing throughout the country, it is anticipated that any normal business entity, legally able to delay payment of large sums of money without interest, would take advantage of that opportunity.

The second part of this legislation recognizes the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position in an appropriate forum. It is similar to but, as regards increased or additional duties, goes beyond 28 U.S.C. 2644 which allows interest to be paid to a successful plaintiff in the Court of International Trade but only from the date of filing of the summons, regardless of the date of payment. The rate of interest to be paid will be that applicable to a late payment of the particular entry.

For purposes of this legislation, liquidation shall be defined as the final computation or ascertainment of the duties or drawback occurring on an entry (19 CFR 159.1).

As discussed above, the U.S. Customs service has continually based its debt collection responsibilities upon the proposition that "[a] bill for duties, taxes, or other charges is due and payable upon receipt thereof by the debtor." (19 CFR 24.3(e)). The decision by the U.S. Court of Customs and Patent Appeals has determined that increased or additional duties determined to be due on liquidation or reliquidation are not due and payable by the importer until either the protest period has expired without a protest being filed or where a protest has been filed and denied, the time to appeal to the Court of International Trade under 28 U.S.C. 1581(a) has expired.

Supreme Court, U.S.
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No. 91-918

In the Supreme Court of the United States

OCTOBER TERM, 1991

KALAN INC. AND HOSPITAL CORPORATION OF AMERICA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Tariff Act of 1930, as amended, provides for the payment of interest by the government on a refund of "any amount paid as increased or additional duties" following a final computation (*i.e.*, liquidation) of import duties due on merchandise entering the country. 19 U.S.C. 1520(d). The question presented is whether this provision also authorizes payment of interest on any excess of estimated duties deposited at entry that is refunded to the importer after liquidation, even though no "increased or additional duties" have been assessed or collected.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Library of Congress v. *Shaw*, 478 U.S. 310 (1986)	4, 8
United States v. *Heraeus-Amersil, Inc.*, 671 F.2d 1356 (C.C.P.A. 1982)	8-9

Statutes and regulation:

Tariff Act of 1930, 19 U.S.C. 1001 *et seq.*:	
19 U.S.C. 1500	2
19 U.S.C. 1505(a)	7
19 U.S.C. 1505(b)	7
19 U.S.C. 1505(c)	2, 4, 7, 8, 9
19 U.S.C. 1520(a)	8
19 U.S.C. 1520(d)	2, 3, 4, 5, 6, 7, 8, 9
28 U.S.C. 2644	3, 5
28 U.S.C. 2645(c)	6
19 C.F.R. 159.1	2

Miscellaneous:

U.S. Tariff Comm'n, *Dictionary of Tariff Information* (1924)	6
H.R. Rep. No. 1015, 98th Cong., 2d Sess. (1984)	4, 7, 9

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals in *Kalan, Inc.* v. *United States* (Pet. App. 1a-10a) is reported at 944 F.2d 847. The decision in *Hospital Corp. of America* v. *United States (HCA)* (Pet. App. 11a-12a) is unreported. The decision of the Court of International Trade in *Kalan* (Pet. App. 13a-20a) is reported at 752 F. Supp. 455, and the decision in *HCA* (Pet. App. 21a-29a) is reported at 752 F. Supp. 459.

JURISDICTION

The judgment of the court of appeals was entered in *Kalan* on September 11, 1991, and in *HCA* on September 20, 1991. The petition for a writ of cer-

tiorari was filed on December 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner Kalan Inc. (Kalan) imported plastic key tags from the Republic of Korea. Pet. App. 2a. The Customs Service classified the tags as jewelry and required Kalan to deposit estimated duties at entry based on that classification. *Ibid.* Subsequently, the Customs Service liquidated the entry "as entered." [1] No duty was refunded at the time of liquidation, nor was any increased or additional duty assessed. *Ibid.* Kalan then filed an administrative protest claiming that the key tags were misclassified on entry and should have received a duty-free classification. *Ibid.* After the Court of International Trade (CIT) decided in a related case that the key tags should be reclassified, the Customs Service reliquidated the entry and refunded the deposited duties to Kalan without interest. *Id.* at 2a-3a.

b. The Customs Service denied Kalan's protest requesting payment of interest on the refunded amount, and Kalan then brought this action in the CIT. Kalan argued that, under 19 U.S.C. 1505(c) and 1520(d),[2]

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[1] See 19 U.S.C. 1500. "Liquidation" is "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. 159.1

[2] Section 1505(c) provides in full:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or

it was entitled to interest on the amount of estimated duties that were refunded at reliquidation from the date of deposit at entry.[3] The government argued that Section 1520(d) did not provide for interest on duties deposited at entry because Section 1520(d) is expressly limited to interest on refunds of amounts "paid as increased or additional duties under section 1505(c)," and no such amounts had been paid here. Pet. App. 16a-17a.

The CIT held that interest was payable on the refunded amount under Section 1520(d) from the date of liquidation. Pet. App. 13a-20a. Rejecting Kalan's claim for interest from an earlier date, the court held that "section 1520(d) does not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties." *Id.* at 15a. In its view, however, upon liquidation, "the duties are no longer estimated," but instead are

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reliquidation at a rate determined by the Secretary of the Treasury.

Section 1520(d) provides in full:

> If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of title 28, whichever occurs first.

[3] The government conceded that Kalan was entitled to interest pursuant to 28 U.S.C. 2644 from the filing date of the summons commencing the suit to the date of the refund. Pet. App. 15a.

" 'duties determined to be due upon liquidation,' within the meaning of section 1505(c)." *Id.* at 16a. On this basis, it held, Kalan was entitled to interest on the entire refunded amount from the date of liquidation. *Id.* at 20a.

c. Both parties appealed, and the Federal Circuit reversed. Pet. App. 1a-10a. The court first noted that under *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986), an award of interest is barred by sovereign immunity absent an express statutory waiver. Pet. App. 4a-5a. It concluded that there was no such express waiver of sovereign immunity in this case. The court observed that Section 1520(d) authorizes interest only on amounts "paid as increased or additional duties," which are not the same as excess amount of estimated duties deposited at entry. *Id.* at 5a-6a. The court observed that "Customs assessed and Kalan paid *no* duties, 'increased' or 'additional,' at liquidation." Because estimated duties are due at the time of entry, not liquidation, the CIT had erred in ruling that these duties had become "duties determined to be due upon liquidation" within the meaning of Section 1505(c). Pet. App. 5a-6a. The court of appeals also observed that "the sole statutory provision dealing directly with the refund of excess deposits [19 U.S.C. 1520(a)] is silent about the addition of interest." *Id.* at 6a. The court of appeals then reviewed the legislative history of Sections 1520(d) and 1505(c), finding that it expressly confirmed that "[i]f any excess duties are being refunded, no interest is payable thereon." Pet. App. 7a (emphasis omitted) (quoting H.R. Rep. No. 1015, 98th Cong., 2d Sess. 67 (1984)).

2. a. Petitioner Hospital Corporation of America (HCA) imported a lithotripter, a medical device that uses sonic shock waves to disintegrate kidney stones.

Pet. App. 22a-23a. HCA deposited the estimated duty at the time of entry, and the entry was liquidated at the amount determined by the entry classification. HCA protested, claiming that the lithotripter should have received a different customs classification. After Customs adopted the classification suggested by HCA, it granted HCA's protest, reliquidated the entry, and refunded the excess amount of duty to HCA without interest. *Id.* at 23a-24a.

b. HCA unsuccessfully protested the failure to pay interest and then filed suit in the CIT. The CIT agreed that HCA was entitled to interest on the refund, holding that, even though HCA made no separate payment at liquidation, it "paid excess duties upon liquidation" because "the estimated duties on deposit with Customs were used to pay what [HCA] was found to owe upon liquidation." Pet. App. 27a. The CIT awarded HCA interest under Section 1520 (d) from the date of liquidation to the date the summons was filed in this action. *Id.* at 27a-28a.[4]

c. Relying on its decision in *Kalan*, the Federal Circuit reversed the award of interest under Section 1520(d). Pet. App. 11a-12a.

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[4] It also awarded HCA interest under 28 U.S.C. 2644 (see note 3, *supra*) from the date of the summons to the date the judgment was paid. Pet. App. 28a-29a.

ARGUMENT

Congress has conferred exclusive jurisdiction on the Federal Circuit to review decisions of the Court of International Trade, 28 U.S.C. 2645(c), thereby establishing it as the specialized and expert tribunal to resolve issues of the kind presented here. The decisions of the Federal Circuit in these cases are correct and do not conflict with any decision of this Court or any court of appeals. Further review is not warranted.

1. Petitioner argues that the "increased or additional duties" upon which interest is payable to the importer under Section 1520(d) include amounts paid *at entry* over and above the amount determined to be due at liquidation. That position is contrary to the plain language of the statute, which makes clear that interest is due only on amounts paid by the importer after liquidation over and above the amount deposited at entry. Section 1520(d) provides for interest only "on any amount paid as increased or additional duties under section 1505(c)." The terms "increased duties" and "additional duties" are terms of art in tariff law. As defined by the United States Tariff Commission (the predecessor of the International Trade Commission):

> Increased duties are the differences between the estimated duties paid upon entry and any increase of regular duties in the liquidated duties as determined by the collector.

Dictionary of Tariff Information 263 (1924). "Additional duties" are those duties "which are assessed in addition to the regular duties accruing under the law." *Ibid.*

The amounts on which interest is payable under Section 1520(d) are those "*paid*" as "increased" or

"additional" duties under Section 1505(c). That Section, in turn, refers to "[d]uties determined to be due *upon liquidation*," and indicates that those amounts are to be paid on or after liquidation (emphasis added). See Section 1505(c) (the amounts "determined to be due upon liquidation * * * shall be due 15 days *after* * * * liquidation * * * and unless payment of the duties is received * * * within 30 days *after* that date, shall be considered delinquent") (emphasis added). Section 1505(b) further provides that the Customs officer "shall collect any increased or additional duties * * * as determined on a liquidation or reliquidation." Thus, "increased or additional duties" assessed at liquidation are duties that are "collected" following liquidation: those duties are distinct from "estimated duties" deposited, and thus collected, at entry. See 19 U.S.C. 1505(a). In sum, the "increased" or "additional" amounts referred to in Section 1520(d) plainly represent money paid after liquidation, not at entry.[5]

Petitioners are not entitled to interest on their refunds of estimated duty under Section 1520(d) because they did not pay any "increased or additional

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[5] As the court of appeals noted (see p. 4, *supra*), the House Report confirms the plain language of the statute. Petitioners err in relying (Pet. 11) on the statement in the House Report that "[i]nterest would be paid on the amount of overcharge at a rate to be determined by the Secretary of the Treasury and determined as of the 15th day after the date of liquidation or reliquidation." H.R. Rep. No. 1015, *supra*, at 67. That statement is taken out of context. That portion of the Report addresses the rate and commencement date of the interest, rather than the type of "overcharge" to which interest applies. In any event, the statutory language does not employ the term "overcharge," but instead expressly specifies that "interest shall be allowed on any amount paid as increased or additional duties." 19 U.S.C. 1520(d).

duties" either at liquidation or at any other time. The refunds to petitioners were authorized by 19 U.S.C. 1520(a), which provides for the refund of excess duties deposited at entry whenever, as here, "it is ascertained on liquidation or reliquidation" that a lesser amount of duty is due. This Section, unlike Section 1520(d), does not authorize interest on the amounts refunded. In the absence of an express statutory authorization for interest, there can be no award of interest against the government. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).[6]

2. Petitioners argue that the government's interpretation of Section 1520(d) is contrary to Congress's intent because it results in an unfair disparity between the interest Customs pays on overpayments of duty and the interest importers pay on deficiencies in duty payments. Pet. 10-11.

To the contrary, the scheme of reciprocal interest payments is symmetrical and carries out Congress's intent. Section 1505(c) was enacted in 1984 to remedy delays in the payment of increased or additional duties assessed at liquidation. The law was in part a response to the decision in *United States* v.

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[6] In both *Kalan* and *HCA*, the CIT reasoned that the estimated duties deposited by both petitioners at the time of entry later became the duties determined to be due upon liquidation. Pet. App. 16a, 27a. As the Federal Circuit recognized, however, Section 1520(d) authorizes interest only on amounts that are "paid" under Section 1505(c) as "increased or additional duties" after liquidation—which do not include amounts paid at entry. Moreover, the CIT's construction of Section 1520(d) led it to conclude that petitioners were entitled to interest from the date of liquidation. As the Federal Circuit noted (Pet. App. 4a), that result is directly contrary to the language of Section 1520(d), which states that interest "shall be calculated from the date of payment." The only payments petitioners made were at the time of entry.

Heraeus-Amersil, Inc., 671 F.2d 1356 (C.C.P.A. 1982), in which the court barred Customs from initiating efforts to collect those duties until at least 270 days after liquidation. See Pet. App. 8a, 36a-37a. Section 1520(d) was enacted in recognition of "the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position [that a refund is due] in an appropriate forum * * * as regards increased or additional duties." Pet. App. 9a (quoting H.R. Rep. No. 1015, *supra*, at 68).

Thus, Sections 1520(d) and 1505(c) both authorize the payment of interest only on "increased" or "additional" amounts that the importer is required to pay following liquidation—that is, duties over and above amounts deposited at entry. Under Section 1520(d), Customs must pay interest if any such additional payments are subsequently refunded. Under Section 1505(c), the importer pays interest on late payment of additional unpaid amounts found to be due at liquidation. See Pet. App. 8a-9a, 37a. The statute does *not* require the importer to pay interest on deficiencies in estimated payments from the time of entry until the payment of the "increased" or "additional" amounts determined to be due on liquidation, but only from the date those "increased" or "additional" amounts are due until payment is made. Likewise, Customs does not pay interest to importers on refunds of excess estimated duties deposited at entry, but only on "increased" or "additional" duties that are paid to Customs after liquidation and are subsequently refunded. Hence, the scheme Congress enacted operates symmetrically; but, even if it did not, it would still be the scheme that the courts are bound to enforce.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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No. 91-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KALAN INC. and
HOSPITAL CORPORATION OF AMERICA,
Petitioners,

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF OF BAXTER HEALTHCARE CORPORATION, BULOVA CORPORATION, G.D. SEARLE & CO., GENERAL MOTORS CORPORATION, NATIONAL MEDICAL CARE, INC. (A WHOLLY-OWNED SUBSIDIARY OF W.R. GRACE & CO.), SEARS, ROEBUCK AND CO., SUNDSTRAND CORPORATION, VOLVO/GM HEAVY TRUCK CORPORATION, AND ZENITH ELECTRONICS CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, under 19 U.S.C. § 1520(d), U.S. importers are entitled to interest on excess duties required to be deposited at the time of entry of merchandise into the United States, when the U.S. Customs Service refunds such excess duties pursuant to an administrative protest or court order?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
THE WRIT SHOULD BE GRANTED TO CORRECT THE FAR-REACHING, ERRONEOUS AND UNFAIR CUSTOMS SERVICE POLICY AFFECTING INTEREST ON DUTY REFUNDS	6
I. CONGRESS SPECIFICALLY PROVIDED FOR THE PAYMENT OF INTEREST TO IMPORTERS WHEN EXCESSIVE DUTIES ARE REFUNDED	6
A. The Customs Courts Act Of 1980 First Provided For The Payment Of Interest To Importers	7
B. The Trade And Tariff Act Of 1984 Extended The Scope Of The Interest Payment Period To The Date Of Liquidation	9
II. THE COURT OF APPEALS DECISION MISINTERPRETS THE LEGISLATIVE HISTORY OF SECTION 1520(d) AND MISCONSTRUES THE LANGUAGE ADOPTED BY CONGRESS	12
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page

Hospital Corporation of America v. United States, 752 F. Supp. 459 (CIT 1990), *rev'd*, Court No. 89-08-00462 (Fed. Cir. Nov. 23, 1990) 6, 7, 18
Kalan Inc. v. United States, 944 F.2d 847 (Fed. Cir. 1991) 6, 7, 8, 13
Perry v. Commerce Loan Co., 383 U.S. 392 (1966) 18
United States v. Heraeus-Amersil, Inc., 671 F.2d 1356 (C.C.P.A. 1982) 10

STATUTES

Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) 6, 7, 10
Trade and Tariff Act of 1984, Pub. L. No. 98-573 98 Stat. 2948 (1984) 3, 6, 9, 10
19 U.S.C. 128 15
19 U.S.C. 129 15
19 U.S.C. 1202 16
19 U.S.C. 1303(a) (1) 15, 17
19 U.S.C. 1304(f) 15
19 U.S.C. 1336 15
19 U.S.C. 1338 15
19 U.S.C. 1361 16
19 U.S.C. 1505(b) 15
19 U.S.C. 1505(c) 10, 14
19 U.S.C. 1514 3
19 U.S.C. 1520(d) 7, 9, 10, 11, 12, 13, 14, 18
19 U.S.C. 1557(b) 16
19 U.S.C. 1671(a) 15, 17
19 U.S.C. 1673 ..... 15, 17
19 U.S.C. 1821 15
19 U.S.C. 1981(a) (1) and (c) (1) 15
19 U.S.C. 2111 15
19 U.S.C. 2134(a) (2) 15
19 U.S.C. 2135(c) 15
19 U.S.C. 2138 15
19 U.S.C. 2151 15
19 U.S.C. 2492 16
28 U.S.C. 2632 11
28 U.S.C. 2637 9
28 U.S.C. 2644 ..... 6, 7, 11

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS AUTHORITIES Page

H.R. Rep. No. 1015, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 4960 ..... 3, 7, 10, 11, 14
H.R. Rep. No. 1235, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 3753 ..... 8, 9
Hearings on the Customs Courts Act of 1980, Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 96th Cong., 2d Sess., Serial 31 (1980) 5, 9
Hearings and Written Comments Before the Subcomm. on Trade of the House Committee on Ways & Means, 98th Cong., 1st and 2d Sess., November 15, 1983 and June 21, 1984, Serial 98-76 (Printed 1985) 16
Hearings before The Subcomm. on Trade of The House Committee on Ways & Means, 101st Cong., 2d Sess., Serial 101-93 (1990) 5
Hearings on Commercial Operations of the U.S. Customs Service, Subcomm. on Trade of The House Committee on Ways & Means, 101st Cong., 2d Sess., Serial 101-99 (1990) 5
50 Fed. Reg. 21832 (May 29, 1985) 17

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BRIEF OF BAXTER HEALTHCARE CORPORATION, BULOVA CORPORATION, G.D. SEARLE & CO., GENERAL MOTORS CORPORATION, NATIONAL MEDICAL CARE, INC. (A WHOLLY-OWNED SUBSIDIARY OF W.R. GRACE & CO.), SEARS, ROEBUCK AND CO., SUNDSTRAND CORPORATION, VOLVO/GM HEAVY TRUCK CORPORATION, AND ZENITH ELECTRONICS CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Baxter Healthcare Corporation (hereinafter "Baxter") is incorporated in Delaware and has facilities in forty states, as well as the District of Columbia, and twenty-eight foreign countries. It is the leading international manufacturer and marketer of healthcare products, sys-

tems and services. Revenue generated from its worldwide operations was $8.9 billion in calendar year 1991.

Joining Baxter as *amici curiae* are Bulova Corporation, G.D. Searle & Co., General Motors Corporation, National Medical Care, Inc., Sears, Roebuck and Co., Sundstrand Corporation, Volvo/G.M. Heavy Truck Corporation and Zenith Electronics Corporation. These companies are major manufacturers or distributors in the United States and represent important segments of their respective industries.

Although the *amici* manufacture or purchase many of their products in the United States, they also operate foreign production plants and import significant quantities of manufactured products and raw materials. By virtue of such foreign sourcing, the *amici* are involved on a continuing basis with the U.S. Customs Service which has both the authority and responsibility for assessing duties on goods entering the United States.[1]

As the result of the *amici*'s status as significant importers, they are unreasonably burdened financially when the Customs Service collects duties in excess of those warranted by law. The reach of the court of appeals' decisions allowing Customs to retain such overcharges with-

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[1] The customs duties that are imposed on imported merchandise are levied based on the tariff classification of such merchandise into different tariff provisions. These provisions are established by law and to an increasing degree are harmonized with similar classification schemes used by trading partners of the United States. The particular classification of many products is well-established and routine. In many instances, however, tariff provisions are ambiguous and merchandise may not clearly fall into any one specific provision. This uncertainty may result in disagreements between the importer and the Customs Service as to the proper classification of the goods. In such situations, the Customs Service typically will require an importer to enter the merchandise under a specific tariff provision with a particular duty applicable to the merchandise so classified. Estimated customs duties are then deposited by the importer when the merchandise is formally entered into the United States.

out compensation to importers thus touches virtually all who import goods into the United States. In one case alone, the most costly situation with Customs now confronting Baxter, it is seeking duty refunds of approximately 4.4 million dollars and some of those allegedly excess duties have been held by the Customs Service for as long as seven years.[2]

SUMMARY OF ARGUMENT

Prior to enactment of the 1984 legislation,[3] the law was clear that if Customs liquidated[4] an import entry with either duty increase or a duty refund (from the time of estimated duty deposit upon importation), no interest accrued in favor of either party.[5] Moreover, in the event of a duty increase, in addition to there being no provision for interest, there was no fixed date by which payment had to be made.[6] Congress sought to correct this situation by providing for interest due the Customs Service on duty increases following liquidation or reliquidation while at the same time providing for the payment of interest to importers on the amount of the overcharge

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[2] If an importer wishes to dispute the classification determined by Customs and the applicable duty rate, it often must wait months, and sometimes years, for the entry of the merchandise to be processed by the Customs Service and for the completion of the administrative protest procedure. During this entire period, the Customs Service retains the estimated duties paid by the importer.

[3] Section 210 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2977, codified at 19 U.S.C. 1505(c) and 1520(d).

[4] "Liquidation" is Customs' final determination of all aspects of the entry including tariff classification and applicable duties associated with the imported product. An importer may pursue any claims for a duty adjustment or refund by filing a protest with Customs within 90 days after liquidation. 19 U.S.C. § 1514.

[5] H.R. Rep. No. 1015, 98th Cong., 2d Sess. 67, *reprinted in* Appendix F to the Petition at 35a.

[6] Pet. App. 35a.

paid by them.[7] This latter provision was viewed by the House Ways and Means Committee as reciprocal and inherently fair.[8] Remarkably, the court below viewed the Committee's discussion of the prior law as signalling an intent not to change it and chided the Court of International Trade for having "ignored the House Report." [9]

Under Customs' present policy, if *amici* protest the amount of duty demanded by Customs upon liquidation and prevail, Customs pays interest only on the refund of any overcharged duties first assessed *upon liquidation.* Thus, if the overcharged duties were first assessed at the time of liquidation, Customs will pay interest on any overcharge of duties, from the date of liquidation to the date of the refund. If, on the other hand, the overcharged duties were paid *at the time of entry,* as is most often the case, and remain unchanged upon liquidation, Customs will not pay interest on any refunded duties.

This policy has led to absurd and unjust results. Customs has complete discretion to set the amount of duties, based solely on its classification of the imported merchandise. In some cases, Customs will direct that excess duties be deposited at the time of entry. In other instances, Customs demands additional duties upon liquidation, based on its reclassification of the merchandise. Despite the identical result in both circumstances (*i.e.*, duty overcharge), Customs refuses to pay any interest in the former situation, even though it will have retained the importer's money for a *longer* period of time (*i.e.*, date of entry versus date of liquidation).

The *amici*, and thousands of other importers, are severely and adversely affected by this "no interest" policy because the overpayment of duties can equal millions of dollars and the use of the monies involved can be denied to the importer for years pending completion of adminis-

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[7] *Id.* at 36a-37a.

[8] *Id.* at 37a.

[9] *Id.* at 9a.

trative protest procedures and, in many cases, litigation. The loss of use of such funds translates directly into additional costs for the companies in the form of increased financing expenses, reduced profits, and in the most egregious cases, where the duty rate is high and the delay long, cessation of business operations. These costs detract from the competitiveness of U.S. companies and thwart Congress' efforts to alleviate this unwarranted government burden on their balance sheets.

The magnitude of the loss confronted by U.S. importers can be appreciated by considering the sheer volume of import transactions. Recently, for example, the U.S. Customs Service estimated that in fiscal year 1989 it processed nine million entries and it collected 18.6 billion dollars in duties.[10] Customs estimated that more than $20 billion in duties would be collected in fiscal year 1991 and that this level would double in 10 years.[11] Even if only a small percentage of imports are embroiled in controversy respecting the appropriate duties to be paid, the cost to importers resulting from the uncompensated imposition of excessive duties is enormous. Moreover, by the Treasury Department's own accounting, the average period of time between liquidation and a court decision resolving any dispute is approximately 46 months.[12]

More fundamentally, and as discussed in the argument of the *amici curiae*, the Customs Service policy and the court of appeals' decision upholding it disregard the will

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[10] *Hearings before the Subcomm. on Trade of the House Committee on Ways and Means*, 101st Cong., 2d Sess. 44-45 (1990), Serial 101-93 (Statement of the Commissioner, U.S. Customs Service).

[11] *Hearings on Commercial Operations of the U.S. Customs Service, Subcomm. on Trade of the House Committee on Ways & Means*, 101st Cong., 2d Sess. 15 (1990), Serial 101-99 (Statement of the Commissioner U.S. Customs Service).

[12] *Hearings on the Customs Courts Act of 1980, Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 88-89 (1980), Serial No. 31.

of Congress as codified in the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984). The policy also eliminates all financial incentive for the Customs Service to resolve quickly disputes affecting classifications and applicable duty rates because the entire cost of funding the excessive amount of duties, prior to their refund by the Customs Service, is borne by the importer of record.

It is for the foregoing reasons that Baxter and the other *amici* support Kalan Inc. and Hospital Corporation of America in their joint petition for a writ of certiorari to the Court of Appeals for the Federal Circuit respecting its decision in *Kalan Inc. v. United States*, 944 F.2d 847 (Fed. Cir. 1991) and *Hospital Corporation of America v. United States*, (Court No. 89-08-00462) (November 23, 1990).

ARGUMENT

THE WRIT SHOULD BE GRANTED TO CORRECT THE FAR-REACHING, ERRONEOUS AND UNFAIR CUSTOMS SERVICE POLICY AFFECTING INTEREST ON REFUNDS

I. CONGRESS SPECIFICALLY PROVIDED FOR THE PAYMENT OF INTEREST TO IMPORTERS WHEN EXCESSIVE DUTIES ARE REFUNDED

The idea of compensating importers for the financial cost associated with the Customs Service's over collection of customs duties was first addressed by Congress in the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980). Section 301 of that law authorizes the Court of International Trade to award interest, commencing on the date of the filing of a summons, to a successful plaintiff when the result of its lawsuit is the refund of customs duties.[13]

Four years later, Congress passed the Trade and Tariff Act of 1984, *supra*, which expanded the scope of relief

[13] 28 U.S.C. § 2644.

afforded to importers who prevail in obtaining a refund of customs duties. Section 210 of the Act, 19 U.S.C. § 1520(d), directs that interest also be paid on any increased or additional duties when reliquidation of the entry results in a refund of duties. The date from which interest is to be computed is extended by this provision to the date of payment of the liquidated duties.

The above cited provisions evince an unmistakable Congressional intent to make importers whole for any financial costs that they have suffered by reason of the deprivation of such excess duties as are improperly held by the Customs Service. The court of appeals' decisions in *Kalan Inc.* and *Hospital Corporation of America*, *supra*, misconstrue the meaning of these statutory provisions and, thus, erroneously deny to the petitioners, and all similarly situated importers, the benefit of the interest award that Congress has mandated be paid.

A. The Customs Courts Act of 1980 First Provided for the Payment of Interest to Importers

Section 2644 to title 28 of the U.S. Code became law with the enactment of the 1980 Act.[14] This section is important for two reasons. First, its passage reveals that the Congressional purpose was to mitigate the loss to importers caused by the wrongful retention of excess duties. Second, because the provision is referenced in the 1984 House Committee Report on section 1520(d),[15] it affords some insight into the intent of Congress in en-

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[14] The provision reads as follows:

> If, in a civil action in the Court of International Trade under Section 515 of the Tariff Act of 1930, the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed at an annual rate established under Section 6621 of the Internal Revenue Code of 1954. Such interest shall be calculated from the date of filing of the summons in such action to the date of the refund.

[15] H.R. Rep. No. 1015, 98th Cong., 2d Sess. *reprinted in* 1984 U.S. Code Cong. & Ad. News 4960, 5027.

larging the scope of the provision for the payment of interest beyond that originally provided for in 1980.

It is instructive to consider how Congress in 1980 characterized its attem to redress the costs inflicted on an importer by reason of the Custom Service's collection of too much duty. In pertinent part, the Report of the Committee on the Judiciary accompanying the Customs Courts Act of 1980 reads as follows:

> During the hearings, a member of the private bar urged that the Government pay an importer interest on a refund of excess customs duties because the time between payment of customs duties and the date of the refund pursuant to a court judgment may be as long as four or five years. The Association of the Customs Bar felt it would be desirable to have interest awarded since "the importer must have paid all assessed duties before he can commence an action in the Court of International Trade."
>
> . . . The Subcommittee was persuaded by the concerns of the private bar and adopted an amendment authorizing the Court of International Trade to award interest on a refund of excess customs duties to an importer plaintiff . . . .

H.R. Rep. No. 1235, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 3753. Significantly, Congress chose not to qualify the scope and type of refunded duties made eligible for payment of interest. All excess customs duties refunded in connection with a court judgment or stipulation agreement became subject to the payment of interest with the enactment of this provision.[16] The only explicit limitation was that interest would be computed from the date a summons was filed commencing an action to recover the excess duties.[17]

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[16] The Court of Appeals conceded this in its *Kalan* decision, 944 F.2d 847, 848-849 (1991).

[17] It is noteworthy that the Court of International Trade has jurisdiction over contested Customs' decisions arising from protest

The fact that Congress was not only attempting to make importers whole by the payment of interest but also seeking to make the duty determination process more efficient is demonstrated by an excerpt from hearing testimony that is expressly cited in the Report of the House Committee on the Judiciary.[18]

> I have outlined a little formula in my prepared statement using the rate of inflation together with the current rate of interest. It's not unusual for cases to drag on for 5 or 6 years and even when you win your case, how much is left after 5 or 6 years? I just don't think its simple justice. How could anybody be made whole if he's going to get half his money back after 5 years? . . . My opinion is that if you put something like this in the bill, you will probably increase the likelihood that they will act about five times faster than they do now, which would be a tremendous improvement not only administratively as far as the customs service is concerned but also as far as the Attorney General's office is concerned . . . .[19]

B. The Trade and Tariff Act of 1984 Extended the Scope of the Interest Payment Period to the Date of Liquidation

With the enactment of 19 U.S.C. § 1520(d) as part of the 1984 Trade and Tariff Act, Congress reached

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procedures only if all liquidated duties have been paid at the time that the action is commenced. 28 U.S.C. § 2637. Quite significantly, duties deposited at the time of entry are considered to satisfy this provision relating to liquidated duties.

[18] H.R. Rep. No. 1235, *supra*, at 3753-54. The same Judiciary Committee Report states that the Justice Department did not oppose the awarding of interset. *Id.* The Treasury Department was largely silent on the issue but did provide projections regarding the additional cost that would be incurred if interest were to be made payable to a point earlier in time than the summons filing date, *e.g.*, the date of liquidation or protest approval date. *See Hearings*, *supra* note 12, at 88-89.

[19] *See Hearings, supra* note 12, at 129.

beyond the provisions of the 1980 Customs Courts Act to extend the payment of interest to a point in time preceding the filing of a summons. The date chosen was the date duties are deemed to be paid, which is generally the date the relevant customs entry is liquidated by Customs.

The reason for this legislative action is clear and does not appear to be the subject of any dispute. Congress, confronted by a decision of the Court of Customs and Patent Appeals which permitted importers to defer for as long as 180 days the payment of duties determined to be due at liquidation,[20] was convinced that an earlier due date must be established and that delinquent payments by importers be made subject to interest. Both the due date and the requirement that interest be paid on any payments made more than 15 days after liquidation were incorporated in section 1505(c).[21]

Keenly aware of the need to act in an even handed manner, Congress in section 1520(d) simultaneously made provision for the U.S. Treasury to pay interest to importers in situations in which the U.S. Customs Service determined that overcharges of duties had been made.[22] Thus, Congress directed that in making duty

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[20] *United States v. Heraeus-Amersil, Inc.*, 671 F.2d 1356 (C.C.P.A. 1982).

[21] 19 U.S.C. § 1505(c).

[22] The report of the House Ways and Means Committee on section 203 of H.R. 6064, the provision that ultimately became section 210 of P.L. 98-573, states in pertinent part:

> This section would also amend section 520 of the Tariff Act of 1930 (19 U.S.C. 1520) by adding a new paragraph which would provide for interest to be paid by the government if a determination is made to reliquidate an entry as a result of a protest filed under section 514 of the Act or if any application for relief is made under subsection (c)(1) of Section 520 of the Tariff Act of 1930 or if reliquidation is ordered by an appropriate court. Interest would be paid on the amount of overcharge at a rate to be determined by the Secretary of the Treasury and determined as of the 15th day after the date of

refunds "interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title . . ."

The Committee Report on this provision particularly emphasizes the necessity of equalizing the treatment to be accorded to importers in connection with the payment of interest both when duties are owed to the government and when the government owes the importers a refund of duties:

> The second part of this legislation recognizes the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position in an appropriate forum.[23]

As a matter of logic, reciprocal treatment, as intended by Congress, would require an importer who has deposited duties in excess of those which it is obligated to pay to receive interest from the date of liquidation, paralleling the interest charges payable to the U.S. Treasury by any importer that fails to pay any duties owed at the time of liquidation.

That the Congressional purpose in enacting section 520(d) was consistent with the intent underlying the 1980 changes in the law (when section 2644 was enacted) is again evidenced by the language in the Committee Report describing the reason for the 1984 amendments:

> . . . It is similar to but, as regards increased or additional duties, goes beyond 28 U.S.C. 2644 which allows interest to be paid to a successful plaintiff

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liquidation or reliquidation. Interest would be calculated from the date of payment to the date of refund or the filing of a summons under 2632 of title 28, United States Code, whichever occurs first.

H.R. Rep. No. 1015, *supra* note 15, at 5026.

[23] *Id.* at 5027.

> in the Court of International Trade but only from the date of filing of the summons.[24]

From the foregoing, the evolution in Congressional thinking on the importer's entitlement to interest on excess duties can be clearly discerned. In 1980, when the first provision was enacted, Congress was intent upon ameliorating the unfair hardship caused to importers who went without compensation for long periods pending the refund of excess duties by Customs. At that time, Congress chose the least expensive alternative and allowed interest only from the date that a summons was filed rather than some earlier date.

In 1984, when Congress acted to ensure the prompt payment of duties by dictating that late payment by an importer would be subject to interest charges, it made sure that importers would be treated in an equitable fashion by providing for interest to be paid to importers when it is determined that excess duties have been held beyond the date of liquidation. The court of appeals' finding to the contrary, predicated on erroneous interpretations of both the legislative history and statutory language of section 1520(d), should not be allowed to stand.

II. THE COURT OF APPEALS DECISION MISINTERPRETS THE LEGISLATIVE HISTORY OF SECTION 1520(d) AND MISCONSTRUES THE LANGUAGE ADOPTED BY CONGRESS

The court of appeals' decision construing section 1520(d) to allow interest only on such duties as are actually paid at the time of liquidation or reliquidation imposes a restriction that contravenes the legislative intent of the provision and is not justified by its language. Moreover, the court of appeals' interpretation of section 1520(d) is based on its erroneous misinterpretation of

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[24] *Id.*

the legislative history, specifically the pertinent House Report, and its assignment of a specialized meaning to the statutory words "increased or additional duty" despite the lack of any consistent usage of those words in other code provisions or customs practice.

In particular, the court of appeals placed undue reliance on a single sentence in the House Report to conclude that excess deposits of duty, when refunded at liquidation, are not entitled to receive interest. Thus, the court's decision contains the following language, including a quote from the House Report:

> In short, the House Report confirms that neither section 1520(d) nor section 1505(c) changed prior law: "If any excess duties are being refunded, no interest is payable thereon." House Report at 5026. Curiously, the trial Court ignored the House Report.

Kalan at 851. The passage in question was clearly misinterpreted by the court of appeals, however, as the paragraph to which the court cited is a description of the way that the law and Customs practice was at the time that section 1520(d) was under consideration. It was not a statement of the effect that Congress hoped section 1520(d) would have.

As is frequently the case, the committee report relating to the provision that ultimately became section 1520(d) discussed existing law at the time, addressed the reasons for the changes proposed in the bill, and specified the effect that the proposed legislation would have on law and practice. Reference to the specific language of the House Report reveals that the sentence on which the court of appeals placed such great emphasis [25] is actually contained in the body of a paragraph

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[25] The court of appeals may have adopted as its own an erroneous reference to this sentence which appeared in the appellate brief of the Department of Justice. *Kalan Inc. v. United States, supra,* Brief for Defendant/Cross-Appellant, United States, Appeal Nos. 91-1117, 91-1163 at 29.

that is devoted entirely to what was the status of the law and agency practice at the time that the bill was under consideration by the committee:

> Currently, a deposit of the estimated duties owed must be made at the time of entry of merchandise, other than entry into warehouse, for transportation, or under bond. If it is determined that additional or increased duties are due, the appropriate customs officer must collect them. If any excess duties are being refunded, no interest is payable thereon. No time limits are fixed for the payment of additional or increased duties, and no interest on such amounts owed can be assessed.

H.R. Rep. No. 1015, *supra* note 15, at 5026. The sentence that the court of appeals quotes in its opinion is thus entirely out of context. The positioning of the language in the Report leaves no doubt but that the situation being described was that which existed at the time that the Report was being prepared,[26] not the result that Congress hoped to achieve with its passage of the provision in question. If this were not the case, then the language in the House Report that immediately follows the language quoted by the court of appeals also would have to be deemed to be the effect Congress intended to achieve. But such an interpretation would be plainly wrong as the lack of a fixed time for the payment of additional or increased duties was the problem that Congress sought to rectify with section 1505(c), the companion provision to 1520(d).

The court of appeals' conclusion that the words "increased or additional duties" possess a uniform meaning throughout the various provisions of applicable customs law, regardless of when and why the diverse measures

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[26] The reference in the House Report, moreover, relates to the refund of excess estimated duties at the time of liquidation as opposed to the refund of excess liquidated duties after protest as was in issue in *Kalan* and *Hospital Corporation of America*.

were enacted, is also unwarranted. The fact that "increased or additional duties" are not terms of art with a singular, determinate meaning is apparent from an examination of the diverse ways in which those words have been used. Thus, although the court of appeals concluded that "increased or additional duties" encompass only those duties collected pursuant to section 1505(b) at the time of liquidation or reliquidation, consideration of how those terms have been used both by Congress and Customs refutes the result reached by the appellate court in *Kalan* and *Hospital Corporation of America.*

Congress has modified "duties" by the adjectives "additional" and "increased" many times in Title 19. These adjectives when used with "duties" are used as modifiers; they are never used in the absolute sense or as a definition, as advocated by the Customs Service and condoned by the court of appeals.

Indeed, most of the increased or additional duties enacted by Congress must be paid at entry, not after liquidation. For example, "discriminating duties," 19 U.S.C. 128, are referred to as "additional" duties in 19 U.S.C. 129. Countervailing duties are "in addition to" "any duties otherwise imposed," 19 U.S.C. 1303(a)(1), 1671(a), as are antidumping duties, 19 U.S.C. 1673.

If goods are not properly marked with country of origin, Congress has provided for "Additional duties for failure to mark" 19 U.S.C. 1304(f) ("in addition to any other duty"). Likewise, the Congress has authorized the president to impose "new or additional duties" to counteract discrimination by foreign countries. 19 U.S.C. 1338. And, many other statutes provide similar authority to the president to proclaim additional or increased duties. *See, e.g.*, 19 U.S.C. 1821, 2111, 2134(a)(2), 2135(c), 2138, 2151, 2154, 1981(a)(1) and (c)(1), and 1336.[27]

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[27] There are numerous other examples. In peril point investigations, the International Trade Commission investigates whether any "increases in duties" are required, 19 U.S.C. 1360(a), and reports

Thus, "additional or increased" duties does not have the meaning which the Customs Service and the court of appeals attempt to bestow. Given Congress' consistent use of the words "additional or increased" as adjectives when used with duties, it would have specifically defined what it meant if this term were supposed to mean "duties which are paid after liquidation"—as distinct from refunded amounts of "overcharged duties" which it said it meant.[28] Since the House Report refers to additional or

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to the President who may increase them, 19 U.S.C. 1351, and report to Congress, 19 U.S.C. 1361.

The President must under certain circumstances apply to all dutiable products of uncooperative major drug producing or drug transit countries "an additional duty" not to exceed 50%. 19 U.S.C. 2492(a)(2).

Congress has prohibited the release of merchandise from warehouse without the posting of a bond for the payment of "all unpaid regular, increased, and additional duties, all unpaid taxes imposed upon or by reason of importation, and all unpaid charges and exactions." 19 U.S.C. 1557(b).

Finally, certain duties on wood are "additional duties". *See* 19 U.S.C. 1202, TSUS, schedule 2, part 4, headnote 4. The Harmonized Tariff Schedules of the United States (HTSUS) refines the entire process one step further and has additional duties being imposed on additional duties: Products classified under HTSUS subheadings 4802.51-4802.53 and 4802.60, shall under certain circumstances be subject to "*an additional duty of 10 percent* ad valorem *and in addition thereto*" an amount equal to the highest export duty. U.S. Note 1. to Section X of the HTSUS, emphasis added. Of course, other additional or increased duties can be added to that.

[28] Moreover, not only does Congress not use "additional or increased" duties as terms of art, neither does the Customs Service. As can be seen from the Customs Service's presentation of the bill to the Trade Subcommittee, Customs used a variety of adjectives to describe what it now claims is defined as additional or increased duties. The most frequently used term was "supplemental" duties. *Hearings and Written Comments Before the Subcommittee on Trade of the House Committee on Ways and Means*, 98th Cong., 1st and 2d Sessions, November 15, 1983 and June 21, 1984, Serial 98-76 (Printed 1985). Customs uses the latter term on its liquidation notices.

increased duties as "the amount of overcharge[d]" duties, the court of appeals' interpretation is incorrect.[29]

Indeed, the interpretation proffered by Customs and adopted by the appellate court, would result in an unjust, unfair Catch-22 situation for importers. Upon the entry of any merchandise, Customs requires an importer to deposit estimated duties based upon Customs' classification of the merchandise, whether or not erroneous. Thus, because Customs may demand that excess, *i.e.*, additional, duties be included in the "estimated duties" that later are applied to pay the liquidated duties, there never is a further occasion in such circumstances for Customs to issue a bill for supplemental duty. Indeed, Customs' own actions ensure that no bill for supplemental duty ever will be issued.

Clearly, importers should not be penalized for depositing the "estimated duties" that Customs demands, for having their estimated duties applied to pay the "additional duties" assessed upon liquidation, and for thereafter properly protesting Customs' actions. It is equally clear that Customs should not be rewarded for demanding that importers deposit excess estimated duties, which can then be applied against the overcharged, additional duties assessed upon liquidation. That is precisely

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[29] The regulation promulgated by the Department of the Treasury implementing its responsibilities with respect to the collection and payment of interest immediately after the enactment of the 1984 legislation perhaps also reveals the absence of any consistent usage involving the words "increased or additional duty". 50 *Fed. Reg.* 21832 (May 29, 1985) From that notice, it is evident that the Treasury Department did not categorize all duties collected or payable at the time of liquidation as increased or additional duties. In fact, the notice speaks more generally in terms of overpayments and underpayments of customs duties. Thus, while the Treasury pronouncement identifies antidumping and countervailing duties as being subject to the interest charge provisions of the 1984 Act, it never refers to them as additional duties even though they are categorized as such elsewhere in customs and trade statutes. 19 U.S.C. §§ 1303, 1671(a) and 1673(a).

the effect that the court of appeals' interpretation would have—simply because Customs wrongfully assesses and collects the overcharge sooner (at entry) rather than later (by means of a bill for supplemental duty upon liquidation), it would allow Customs to avoid paying interest when it refunds the monies that wrongfully were assessed, collected and held. Because the appellate court's interpretation of the statute would lead to absurd and unjust results, it must be rejected. *See, Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966).

It could not be more clear that this is exactly the type of situation that Congress had in mind when it enacted 19 U.S.C. § 1520(d). The legislative history specifically refers to a "reciprocity of payment of interest." That provision was intended to put Customs and importers on an even footing. In the event that an importer did not pay duty that properly was due and owing, it would be assessed interest on the unpaid amount. However, on the other hand, if Customs overcharged an importer, and the importer thereafter convinced either the courts (through litigation) or Customs (pursuant to an approved protest) that the entry should be reliquidated and the overcharge refunded, the importer would be paid interest on the refunded, overcharged amount.

It is the Court of International Trade that perhaps best summarized the principle here in issue.

> Since the government had use of that money to which it had no rightful claim, 19 U.S.C. 1520(d) allows the importer to collect interest on the refund. The [importer] should not be denied interest because it deposited estimated duties prior to liquidation, rather than wait until after liquidation to pay.[30]

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[30] *Hospital Corporation of America v. United States*, 752 F. Supp. 459 (CIT 1990).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 7, 1992

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Supreme Court, U.S.
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No. 91-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KALAN INC. AND
HOSPITAL CORPORATION OF AMERICA,
Petitioners,

v.

THE UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONERS' REPLY BRIEF

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EDITOR'S NOTE

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PETITIONERS' REPLY BRIEF

In its opposition, the Government does not, as it cannot, refute the showing that the court of appeals has effectively attributed an intent to Congress to be illogical and irrational. Rather, the Government would have this Court ignore the fact that under the court of appeals' reading of the relevant statute, adjudicated overpayments of import duties retained for a relatively short duration (since a time subsequent to the final ascertainment of duties) will result in interest but not if retained for a relatively long duration (since the time of importation).

Essentially, the Government maintains that the "increased or additional duties" upon which interest is payable to the importer under 19 U.S.C. 1520(d) are terms of art in tariff law and signify a congressional intent not to award interest on Customs overcharges made before the final ascertainment of duties. To support this thesis, it refers to old definitions of "increased duties" ("the differences between the estimated duties paid upon entry and any increase of regular duties in the liquidated duties as determined by the collector") and "additional duties" (those duties "which are assessed in addition to the regular duties accruing under the law"). Opposition at 6. The problem with this position is that the tariff laws are replete with instances in which both "additional duties" and "increased duties" are paid at the time of importation.

Even the term "additional duties", as the Government understands it, embraces such duties as antidumping, countervailing, discriminating, and other duties which are paid at the time of importation but which like ordinary duties are subject to increase, decrease, or no change at the time of liquidation.[1] Thus, overcharged "additional duties", just like overcharged "regular duties", can be paid at the time of importation rather than after liquidation. Since the Government's theory rests on the proposition that "increased or additional duties" necessarily means duties paid after liquidation, it obviously must fall of its

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[1] *See, e.g.*, 19 U.S.C. 128, 129, 1303(a)(1), 1338, 1671(a), 1673(a), 2134(a)(2), 2151(a), and 2154(a). *See also* 19 U.S.C. 1202 (Harmonized Tariff Schedule of the United States, Section X, U.S. Note 1; Chapter 99, U.S. Note 1(b) and Subchapter 1 ("Temporary Legislation Providing For Additional Duties")).

own weight. Indeed, even its (1924) definition of "increased duties" manifestly fails to embrace all types of "increased duties", as that term is also used elsewhere in the tariff laws to mean duties paid at the time of importation. *See* 19 U.S.C. 2135(c); *see also* Brief of *Amici Curiae* at 14-17 & n.29 (and authorities cited).[2]

The Government also argues that the construction given to the statute by the court of appeals carries out Congress's intent of providing for a "scheme of reciprocal interest payments [that] is symmetrical." Opposition at 8. Of course, this is fallacious. If, after liquidation, the Customs Service requires an importer to pay supplemental duties, interest will be charged on those duties if unpaid. On the other hand, if the Customs Service overcollects duties at the time of importation (which is when almost all of the overcharges occur) and retains them beyond the date of liquidation for months or years, no interest at all is awarded for the overcharge. This is hardly reciprocity or symmetry; in fact, the Government itself appears to be aware of this, as it concludes its argument with the claim that "even if . . . [the congressional scheme did not operate symmetrically], it would still be the scheme that the courts are bound to enforce." Opposition at 9.

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[2] The *amici* note that even the Customs Service does not use "increased duties" or "additional duties" as terms of art to refer to additional duties due after liquidation. Brief of *Amici Curiae* at 16 n.28. Rather, when Customs issues a bill following liquidation, it seeks what it calls "supplemental duties". *Id. See also* Customs bills to petitioners, copies of which are included in the record of this case and are reproduced as Appendix G, *infra*, 38a-39a.

In short, the court of appeals' counterintuitive view of the law is not defensible. While Congress is free to enact legislation which is not logical, it is certainly not presumed to do so. In attributing what has to be viewed as an undeniably absurd intention to Congress, the court of appeals misread both the legislative history and the statutory language. Because this case is so important—the reach of the court of appeals' troublesome opinions is vast, touching virtually all who import goods into the United States and who choose to adjudicate claims before the Customs Service and the federal courts—this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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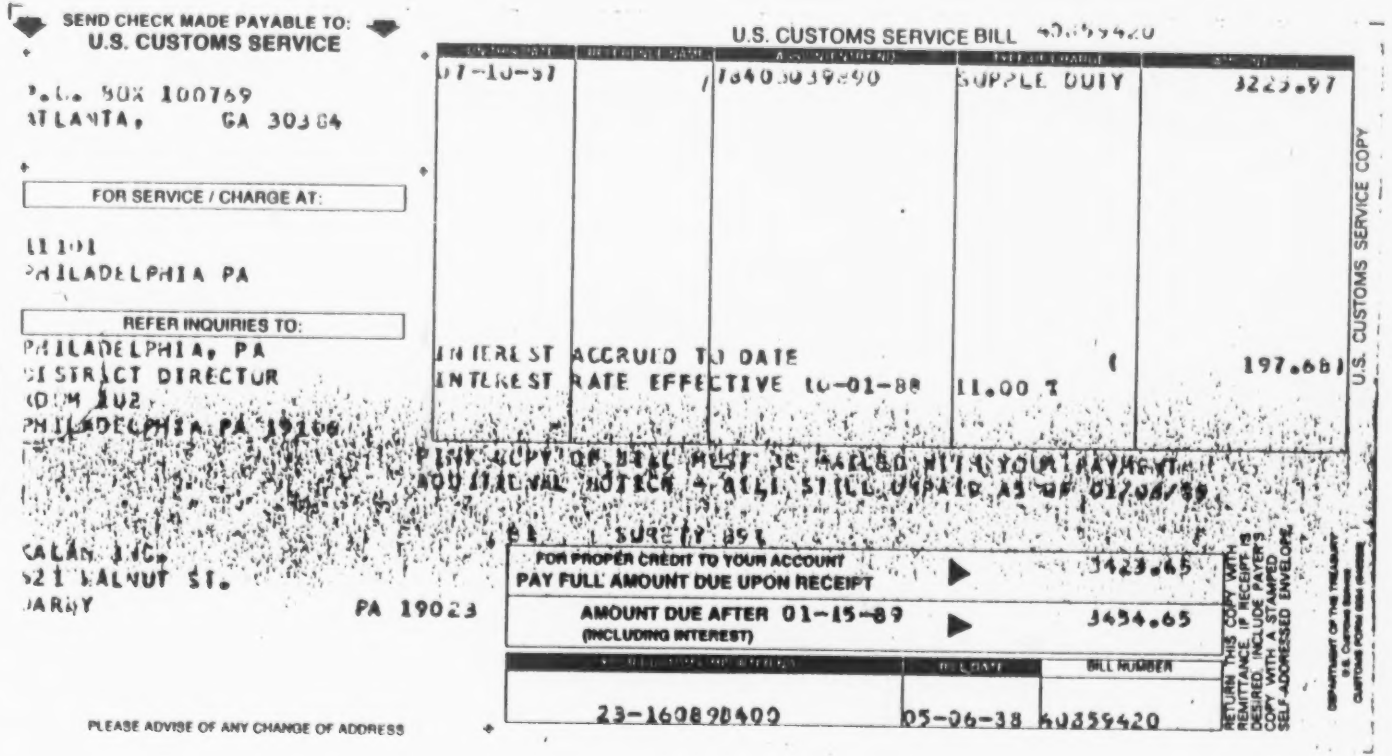
February 1992

APPENDIX

APPENDIX G



SEND CHECK MADE PAYABLE TO:
U.S. CUSTOMS SERVICE

P.O. BOX 100769
ATLANTA, GA 30384

FOR SERVICE / CHARGE AT:

1101
PHILADELPHIA PA

REFER INQUIRIES TO:
PHILADELPHIA, PA
DISTRICT DIRECTOR
(DUM 202)
PHILADELPHIA PA 19106

CALAN INC.
521 WALNUT ST.
JARRY PA 19023

U.S. CUSTOMS SERVICE BILL 60859420

ENTRY DATE	DETAILED DATA	ENTRY NUMBER	TYPE OF CHARGE	AMOUNT
07-10-87		1840039890	SUPPLE DUTY	3223.97
			INTEREST ACCRUED TO DATE	
			INTEREST RATE EFFECTIVE 10-01-88	11.00 %
				197.68

PRINT COPY OF BILL MUST BE MAILED WITH YOUR PAYMENT
ADDITIONAL NOTICE WILL STILL UPDATE AS OF 01/06/89

FOR PROPER CREDIT TO YOUR ACCOUNT
PAY FULL AMOUNT DUE UPON RECEIPT ▶ 3423.65

AMOUNT DUE AFTER 01-15-89 (INCLUDING INTEREST) ▶ 3454.65

ENTRY NUMBER	BILL DATE	BILL NUMBER
23-1608980409	05-06-38	60859420

PLEASE ADVISE OF ANY CHANGE OF ADDRESS

RETURN THIS COPY WITH REMITTANCE. IF RECEIPT IS DESIRED, INCLUDE PAYER'S COPY WITH A STAMPED SELF-ADDRESSED ENVELOPE.

DEPARTMENT OF THE TREASURY
U.S. Customs Service
CUSTOMS FORM 6051 (REVISED)

U.S. CUSTOMS SERVICE COPY

39a

SEND PAYMENT TO
U.S. CUSTOMS SERVICE
P.O. BOX 100769
ATLANTA, GA 30384

SURETY 627

U.S. CUSTOMS SERVICE BILL 402493305-002

ON THIS DATE	REFERENCE NAME (ASSIGNMENT) NO.	TYPE OF CHARGE	AMOUNT
07-06-86	951297302 1512	SUPPLE DUTY	1503.
		PAYMENTS RECEIVED TO DATE	91052.

FOR SERVICE / CHARGE AT:

41512
CHARLOTTE NC

REFER INQUIRIES TO:

CHARLOTTE, NC
PORT DIRECTOR
322 PIPER LANE
CHARLOTTE NC 28219

PINK COPY OF BILL MUST BE MAILED WITH YOUR PAYMENT

0.00 IN INTEREST IS NOW DUE. AFTER
07-19-86, INTEREST OF 11.66 WILL BE DUE
ADDITIONAL NOTICE - BILL STILL UNPAID AS OF 07/07/86

HOSPITAL CORPORATION OF AMERICA 80
ONE PARK PLAZA
NASHVILLE TN 37203

TOTAL AMOUNT DUE UPON RECEIPT 1503.
MAKE CHECK PAYABLE TO U.S. CUSTOMS SERVICE

PORT (ENTRY) NUMBER	BILL DATE	BILL
62-602464300	03-07-86	402

PLEASE ADVISE OF ANY CHANGE OF ADDRESS